

University of Warwick institutional repository: <http://go.warwick.ac.uk/wrap>

A Thesis Submitted for the Degree of PhD at the University of Warwick

<http://go.warwick.ac.uk/wrap/4047>

This thesis is made available online and is protected by original copyright.

Please scroll down to view the document itself.

Please refer to the repository record for this item for information to help you to cite it. Our policy information is available from the repository home page.

THE HISTORIES AND STRUCTURES OF CUSTODIAL INTERROGATION

IAN BRYAN

Thesis submitted in fulfilment of
the requirements for the degree of Doctor of Philosophy (PhD)

The University of Warwick
School of Law

July 1994

THE HISTORIES AND STRUCTURES OF CUSTODIAL INTERROGATION

ABSTRACT

This thesis is concerned with the centrality of the confession as an item of prosecution evidence. It is also concerned with both the structures and strategies that have evolved in the criminal justice system to legitimate the confession and preserve its vitality as evidence probative of guilt.

The socio-legal research evaluates the status of records of police interviews within the context of police custodial interrogations of persons suspected of involvement in crime. To this end the thesis examines the extent to which evidence is "constructed" within a legal framework rather than elicited; how far the 1984 Police and Criminal Evidence Act (PACE) has affected police-suspect relations in interrogations; the circumstances in which suspects "elect" to cooperate with the police or decline to answer specific questions; and the extent to which records of interrogations can be said to be complete, accurate and reliable.

The research comprises a number of different methodologies. The first stage involves a historical and case-based analysis of both the development of the use of confession evidence in criminal cases and of the forms of regulation that have been applied over police access to suspects. The investigation centres upon a structural analysis of the relationship between suspects, the police and the courts and examines the value systems which have conditioned the forms of regulation that have evolved.

The next stage of the study involves a comparative analysis of the content and form of police interrogations and of the reporting or recording systems relating thereto in a sample of cases drawn from the period prior to the introduction of the PACE Act and from a sample generated following the implementation of the Act. This aspect of the research builds upon conceptual categories developed by psychologists, sociologists and criminologists.

This systematic and comparative examination of the interrogation process of the pre-PACE era and the current PACE era is intended as a contribution to the debate surrounding police interview practices and will help resolve contradictory accounts relating to the police role in the criminal justice process. It is, in addition, also intended as a contribution to questions relating not only to the regulation of police powers over suspects but also to those concerned with the form, nature and structure of the police-suspect dynamic and, finally, to those associated with miscarriages of justice.

Ian Bryan.

Acknowledgements

I wish to thank the Economic and Social Research Council (ESRC) for providing the grant which helped me to conduct the research for this thesis. I would also like to thank Jolyon Hall and the other members of staff at the University of Warwick Library who assisted me over the years.

Grateful thanks are also offered to Mark Charlton and Francis Halstead of the Computing Services Centre at the University of Warwick.

Unfortunately, my promise of complete confidentiality, regarding a number of persons, cases and areas, prevents me from identifying the individuals who gave me access to their records and files. However, I take this opportunity to express my gratitude to all concerned.

I owe a particular debt of gratitude to my thesis supervisor, Professor Mike McConville. He proved to be a constant source of help in my work by encouraging my interest, sustaining my confidence during bouts of despair and by rigorously criticising my early drafts. I hope he finds this thesis a worthwhile end-product of his invaluable support and friendship.

I would also like to acknowledge the debt of gratitude I owe to my very great and loyal friend, Neda Sadoughi-Nejad. I thank her for her unfailing confidence in me and my abilities during periods of uncertainty and for her enduring support.

Finally, many thanks are also due, and offered in full measure, to all who have helped me - whether directly or indirectly, knowingly or unknowingly - in the preparation of this thesis.

Ian Bryan.

**To
Ivan and Mavis**

CONTENTS

<i>Abstract</i>	ii
<i>Acknowledgements</i>	iv
<i>List of Tables</i>	vi

INTRODUCTION	1
---------------------	----------

Research Methods	5
------------------	---

1. THE EVOLUTION OF TRIAL BY JURY AND THE PLACE OF CONFESSION EVIDENCE	7
---	----------

Introduction	7
The Evolution of the Jury of Accusation	8
The Emergence and Legitimation of the Petit Jury	12

2. COERCED CONFESSIONS AND DUE PROCESS REACTIONS	21
---	-----------

Introduction	21
Medieval Developments: Inquisition and Accusation	22
The Legality of Torture Questioned	30
Star Chamber	31
The Common Law Courts	33
Inquisition Under Attack	35
The Trial of John Lilburn	37

3. THE HISTORICAL MANAGEMENT OF PRELIMINARY PROCEDURES	43
---	-----------

Introduction	43
The Early Justices	44
Examining Justices	46
The Marian Statutes	54
Conclusion	63

4. LEGITIMATING CONFESSIONS THROUGH "VOLUNTARINESS"	66
Introduction	66
The Privilege Against Self-Incrimination and the Evidential Requirement of Voluntariness	69
An Exclusionary Rule of Law	74
Conclusion	90
 5. THE EXCLUSIONARY RULE IN THE PROSECUTION PROCESS OF THE SECOND HALF OF THE NINETEENTH CENTURY	 92
The "New" Police in the Nineteenth-Century Prosecution Process	92
Voluntariness and Police Questioning	95
The Crown Against Johnston	102
Conclusion	115
 6. TOWARDS THE REGULATION OF CUSTODIAL INTERROGATIONS	 118
Introduction	118
Facilitating Custodial Interrogations	120
Due Process Values Upheld	126
Conclusion	137
 7. CONFESSIONS IN THE PRE-20TH CENTURY CRIMINAL PROCESS: A BROAD VIEW	 144
Introduction	144
Packer's Models	145
The Models and their Animating Values	146
Confessions - Crime Control and Due Process Trends Between the 11th and 19th Centuries: An Overview	149
Bentham and the Privilege Against Self-Incrimination	159
Competency Secured	162
The Practical Effects of the 1898 Act	165
Adverse Inferences	167
Conclusion	169

8. THE GENESIS OF THE JUDGES' RULES	170
The 1912 and 1918 Judges' Rules	175
The Report of the 1928-9 Royal Commission	186
The Revised Judges' Rules	200
Conclusion	205
 9. PRE-PACE CUSTODIAL INTERROGATIONS: IMAGES OF DETAINEES	 206
Introduction	206
Some Preliminary Points	209
Images of Detainees	212
Conclusion	256
 10. PRE-PACE CUSTODIAL INTERROGATIONS: IMAGES OF THE POLICE AND THE INVESTIGATIVE PROCESS	 258
Introduction	258
Images of the Police and of Police Investigations	260
Conclusion	381
 11. CUSTODIAL INTERROGATIONS UNDER THE PACE REGIME: IMAGES OF DETAINEES	 282
Introduction	282
The Regulation of Custodial Interrogations - Judges'	
Rules to PACE Codes: An Outline of the Reform	
Process	282
Towards a Royal Commission	284
Detention and Interrogation: Proposals of the RCCP	289
An Evaluation	293
The Legislation	298
The Present Study	299
Images of Detainees Under PACE	300
Conclusion	328

12. CUSTODIAL INTERROGATIONS UNDER THE PACE REGIME: IMAGES OF THE POLICE AND POLICE QUESTIONING	329
Introduction	329
Images of the Police and the Investigative Process Under PACE	334
Conclusion	382
 13. IMAGES OF THE POLICE-SUSPECT DYNAMIC: A COMPARATIVE ANALYSIS	 384
Introduction	384
Images of Custodial Interrogations: Pre-PACE and Under PACE	384
Conclusion: Impact of the PACE Reforms	394
 14. IMAGES OF CUSTODIAL INTERROGATIONS: CONTINUITY AND CHANGE	 398
Introduction	398
The Centrality of Confessions: Legitimizing Projects	398
Conclusion	411
 <i>INDEX OF CASES</i>	 414
<i>INDEX OF OFFICIAL PUBLICATIONS</i>	419
 <i>BIBLIOGRAPHY</i>	 421

List of Tables

1. Mode of Interview Record, Pre-PACE	210
2. Adviser's Attendance at Interrogation, Pre-PACE	211
3. Mode of Interview Record, Pre-PACE and PACE	386
4. Use of Expletives by Detainee, Pre-PACE	388
5. Use of Expletives by Detainee, PACE	388
6. Use of Criminal Argot by the Police, Pre-PACE	389
7. Use of Criminal Argot by the Police, PACE	389
8. Adviser's Attendance at Interrogation, PACE	391
9. Police Use of Leading Questions, Pre-PACE	392
10. Police Use of Leading Questions, PACE	393
11. Police Use of Legal Closure Questions, Pre-PACE	393
12. Police Use of Legal Closure Questions, PACE	393

INTRODUCTION

Recent notorious miscarriages of justice have highlighted serious failings within successive stages of the criminal justice process from initial investigation right through to appeal.¹ Of the numerous issues raised, perhaps the most important relate to the reliance modern procedures place upon confessions as evidence probative of guilt² and, in order to procure such evidence, the custodial or extra-judicial interrogation of suspects by the police.³ The series of wrongful convictions has given new impetus to long-standing concerns over the voluntariness, reliability and validity of confession evidence which, in the absence of a formal and mandatory corroboration requirement, may lawfully form the sole basis for convictions.⁴ The 1984 Police and Criminal Evidence Act which currently regulates both police interrogations and the reception in evidence of confessions, attempts to address these concerns. At the same time, however, it effectively ensures that the status of confession evidence is preserved. The Act, therefore, clearly accepts the long and widely held view that interrogations and their prime object, confessions, are indispensable to the discovery and clearance of criminal offences. As Lord Devlin once put it:

the accused's statement to the police often plays a great part in the prosecution's case. There can be no doubt of that, and I should emphasise it.... the evidence which ... interrogation produces is often decisive. The high degree of proof which the English legal system requires ... often could not be achieved by the prosecution without the assistance of the accused's own statement.⁵

¹ A major inquiry into the operation of the criminal process was set up in 1991 following a string of miscarriages of justice. The Royal Commission on Criminal Justice (RCCJ) was, by its terms of reference, specifically directed to "examine the criminal justice system from the stage at which the police are investigating an alleged or reported criminal offence right through to the stage at which a defendant who had been found guilty of such an offence has exhausted his or her right of appeal." (RCCJ, *Report*, 1993 Cm.2263, para.5, p.1.)

² Throughout this thesis the term confession is used with reference to statements which are partly or wholly adverse to the maker. It therefore adopts the definition supplied by s.82 (1) of the Police and Criminal Evidence Act, 1984.

³ See Greer, 1994, p.110.

⁴ See RCCJ, *Report*, paras.65-87, pp.64-68.

⁵ Devlin, 1960, p.48. Similar assertions, made without empirical support, are discussed and challenged by Baldwin and McConville, 1980, pp.2-7. See also Morris, 1980, pp.12-14.

Whilst there is a strong body of empirical evidence to suggest that the importance of confession evidence when obtained through police interrogations has been exaggerated,⁶ it continues to be prized as "the clearest evidence of guilt".⁷ It is claimed that it works, more than any other item of evidence, to "alleviate doubts" in the minds of police officers, legal advisers, judges and jurors.⁸ It is also believed to benefit the confessor since by "purging himself of his guilt, he communicates his desire to make amends to society for his wrongful acts, thereby preparing the way for his return to its good graces."⁹ The large proportion of criminal convictions in which confession evidence has played a crucial role would seem to lend support to such claims.¹⁰

Given that modern practices respecting the procurement, status and critical role played by the confession may be more fully understood when considered in historical context, this thesis aims, firstly, to trace the development, use and regulation of confession evidence from the Middle Ages to the present, paying particular attention to the extra-judicial or pre-trial phases of the criminal process. The second and closely related aim is to illuminate the structures and strategies that have evolved during this period to legitimate those procedures so as to preserve the vitality of the confession as a central item of prosecution evidence.

These aims exist at the heart of the thesis and inform its central concern: the legitimating forms that, during the history of the criminal justice process, have been utilised both to safeguard confessions and to protect the at times covert and more recently increasingly open methods used to secure them.

The thesis begins with a consideration of the process under which presenting (or grand) juries and trial (or petit) juries came to displace the older modes of proof in thirteenth-century England. It focuses upon the evolution and legitimation of the jury and, once established, its growing dependence upon evidence presented before it by officials made responsible for

⁶ McConville and Baldwin, 1981, pp.126-140, 153-4; 1982, pp.165-9; McConville, 1993, pp.29, 38-88.

⁷ Driver, 1968, p.42. See also McConville and Baldwin, 1982, p.169; RCCJ, *Report*, 1993, para.31, p.57; paras.65, 67, p.64.

⁸ Driver, *ibid.* See also McConville and Baldwin, 1982, p.169-70; RCCP, *Report*, 1981, para.4.74.

⁹ Driver, *ibid.* See also Morris, 1980, pp.11-12.

¹⁰ See McConville and Baldwin, 1982, p.166; Maguire and Norris, 1992, p.1; RCCJ, *Report*, 1993, para.67, p.64.

getting up the case for the Crown. The early history of the jury is explored in order to explain why confession evidence - which, at the outset, was of little significance - became a central feature of the administration of justice as the role of the juror took on its modern form.

Chapter two considers the period from the late Middle Ages to the seventeenth century. It examines the inquisitorial measures, including the private application of physical torture, resorted to in order to obtain admissions of guilt to be publicly validated at trial and considers the procedural reforms introduced in response to the hostility the use of such measures engendered. It is suggested in the chapter that while the reforms addressed the crisis of legitimacy provoked by challenges made to inquisitorial procedures, the confession of suspected or accused persons continued to play a pivotal role in the administration of justice.

This point is picked up and explored further in chapter three which turns to the pre-trial process as it operated under the Justices of the Peace from "pre-modern" times to the mid-1800s when the justices were effectively judicialised and the "new" police began to assume control over the investigation and prosecution of criminal offences. During the period covered by these dates the justices were given statutory powers to conduct extra-judicial and inquisitorial examinations of suspects in order to secure incriminatory evidence and to present that evidence at trial. However, the procedural reforms that were, from the seventeenth century, being introduced at common law trial also began to have an impact on the pre-trial process. As a consequence of these reforms the concept of voluntariness began to govern and therefore legitimate the admissibility of confessions made in the extra-judicial context, initially to examining justices and later, as the "new" forces of law and order developed, to police officers.

The relationship between the procedural reforms of the mid-seventeenth century and the voluntariness or exclusionary rule are discussed in chapter four. A case-based analysis of the operation of the rule is conducted in this and the following two chapters to highlight the divergence of judicial opinion as to the scope and application of the rule during the nineteenth century and early part of the twentieth century. The cases demonstrate that while some judges, solicitous of the rights afforded to suspects, were strongly opposed to unauthorised extra-judicial questioning, others viewed the practice as a legitimate and indeed vital weapon for crime control and to this end placed a narrow construction on the voluntariness test, one which was essentially permissive of both police interrogations and their evidential fruits.

A thematic overview of the historical evidence, covering the period between the thirteenth and nineteenth centuries, is conducted in chapter seven. It also identifies a number of crime control and due process trends within the development of the legal process relating to

confessions. It assesses the significance of the seventeenth century recognition of the privilege against compulsory self-incrimination before addressing the work of one of its leading opponents, Jeremy Bentham. The chapter shows that the arguments championed by Bentham and others contributed to the partial erosion of the privilege under a series of nineteenth-century enactments which culminated with the 1898 Criminal Evidence Act and helped to sustain the crime control utility of confession evidence.

The next chapter gives consideration to twentieth century developments. It focuses upon the regulatory framework which functioned to legitimate the procurement of extra-judicial confessions by the police. In assessing the process through which both police interrogations and the private nature of their custodial interactions with suspects were progressively legitimated under the Judges' Rules, the chapter highlights disjunctures between the rhetoric of the law and the reality of police practice relating to the detention and interrogation of suspects. It also discusses the effects of crime control demands for the law to legitimate that practice.

The structure and nature of the interrogation process; the police-suspect dynamic in the interrogation process; and images of that dynamic, as detailed in cases prepared for prosecution in the period prior to and following the introduction of the 1984 Police and Criminal Evidence Act, form the subject matter for the remaining chapters. The chapters examine the results of an empirically-based study undertaken to determine the extent to which images of police interrogations can be said to be self-legitimizing. The chapters also seek to determine how far and in what ways the capacity of the police to actively construct images of themselves and of detainees has been affected by the introduction of contemporaneous recording systems under the 1984 legislation.

Chapters nine and ten assess and evaluate the form and content of recorded interrogations associated with 400 cases determined in the Crown Court during the period in which the interrogation of suspects by the police was governed by the Judges' Rules. A similar exercise is conducted, in chapters eleven and twelve, in respect of 283 cases determined in the Crown Court in the period following the implementation of the 1984 Police and Criminal Evidence Act and its supplementary Codes of Practice. The following chapter widens the discussion. It takes a broad view of the pre-PACE and PACE empirical data discussed in the preceding four chapters and considers the images of the police-suspect dynamic the respective data sets contain.

The concluding chapter reviews the historical and empirical evidence examined in the preceding chapters and discusses the themes of continuity and change with respect both to the

role of the confession as a *prima facie* reliable specie of prosecution evidence and the various legitimating forms that, from the late Middle Ages to the present, have been utilised in the on-going project to preserve that role.

Research Methods

The findings presented in the first eight chapters are based on primary and secondary historical sources which were used to identify the significance given to confession evidence in criminal cases and to explain the continuing vitality of the confession as a central item of prosecution evidence. This involved a re-examination of decided cases in which conflict over the legitimate grounds for receiving or excluding extra-judicial confessions in evidence occurred against a background of concern over the relationship between the state and its officials, on the one hand, and the citizen, on the other. These sources provided a standpoint from which to view contemporary developments regarding the place of confession evidence in the criminal process and the forms of regulation that have been applied over police access to suspects.

The methodology used in the remaining chapters involved a close reading of prosecution case papers submitted in evidence to courts of law at two significant periods. The first, at that point in history, prior to the implementation of the 1984 Police and Criminal Evidence Act (PACE), where the police enjoyed unmediated control over the way in which police-suspect encounters were represented to courts. This is compared and contrasted with the situation that prevailed during the second period, that is, after the implementation of the 1984 Act and its requirement for official encounters with suspects to be contemporaneously recorded.

The overall objective was to establish whether representations of police-suspect encounters had changed, and with them the images conveyed to courts about such encounters, to see whether this provides information about the way in which confession evidence has been seen to be legitimate. To this end the pre-PACE and PACE interrogation records collected during the course of the study were subjected to a quantitative analysis using a coding schedule and a qualitative analysis using analytical categories generated by the study and applied consistently across the case papers.

In an attempt to reduce the problem of subjectivity, case examples have been used in the chapters concerned with the pre-PACE and PACE police-suspect dynamic both to illustrate commonly observed features and to buttress the bare classifications applied. The names of

individuals and of places in those case examples have, however, been altered or disguised in order to protect the anonymity of all persons connected with specific cases.

The methodology used in the empirical sections of the thesis does not imply or rest upon the basis that the accounts presented by the police faithfully replicate an external reality, nor does it imply that the accounts, even if faithful, comprehensively describe the nature and content of the police-suspect dynamic. It is also acknowledged that the study is subject to the limitation that the sample of cases relied upon are not necessarily representative of Crown Court cases throughout the country during the pre-PACE or PACE eras. Cases were not, however, selected on any basis other than their availability.

These limitations notwithstanding, the methodology adopted in the study permitted a systematic and comparative analysis of the value accorded to confession evidence and of the pre-trial procedures in which that evidence is most commonly secured. It is hoped that in viewing contemporary practices, as reflected in the content and form of records of police interrogations, from a wide historical perspective, this study will contribute to an understanding of issues that relate to the regulation of police powers over suspects; that pertain to the reliability and status of uncorroborated extra-judicial confessions; and that are associated with miscarriages of justice.

1

THE EVOLUTION OF TRIAL BY JURY AND THE PLACE OF CONFESSION EVIDENCE

Introduction

Confession evidence emerged as a central feature of the administration of justice following the thirteenth-century displacement of adjudicative structures which, by and large, relied upon accusatory procedures. Under these procedures a private party would make an accusation and swear an oath to its truth. The accused, in contesting the case, would respond by asserting, also on oath, that the accusation was false.¹ In more serious cases the judgment of God was solicited through the ordeal.² Alternatively, the parties in dispute, or parties designated by them, would engage in judicial combat. This was also considered to be a form of ordeal "on the grounds that God would permit the victory only of the party in the right."³

The great reliance the pre-modern modes of proof place upon the judgment of God meant that before the thirteenth century confessions as sufficient evidence of guilt played only a marginal role in the administration of justice. This chapter will discuss the conditions and events that contributed, firstly, to the displacement of the ancient modes of proof; secondly, that attended the advent of the petit jury mode of trial and with it the need for the adduction of evidence; and, finally, that saw confession evidence become legitimated as "the queen of proofs"⁴ in the increasingly specialised machinery of secular justice established following the Norman Conquest.

¹ Either party to the dispute might support their own oath with those of oath-helpers or compurgators, persons willing to testify to a person's good character rather than to any fact at issue. See Jenks, 1912, p.9; Peters, 1985, pp.41-2. For a discussion of this form of trial see Thayer, 1898, pp.24-34.

² Thayer, 1898, pp.34-9.

³ Peters, 1985, p.42. See also Thayer, 1898, pp.39-46.

⁴ Peters, 1985, p.41.

The Evolution of the Jury of Accusation

Exalted as one of the most fundamental and ideologically important institutions of the common law system of justice,⁵ trial by jury has its antecedence in the eleventh century invasion and settlement of England by the Normans.⁶ With the conquest, the Norman Kings introduced a centralised system of government, administered by delegates of royal power, which came to displace the disparate arrangement of communal tribunals that administered what were the local customary laws employing "irrational" modes of proof and trial.⁷ The precise origins of the jury remains a matter of debate which has become polarised into two schools of thought:⁸ one regarding the jury as an essentially Anglo-Saxon institution; and the other believing it to be a Norman innovation.⁹ It is generally agreed, however, that the Normans contributed to the evolution of the jury with their introduction of the inquest.¹⁰

Inherited from the Frankish Kings, the inquisition or *inquisitio* procedure became a regular and principal feature in the administration of the Norman system of central government¹¹ and evolved to form what is understood to be "the root from which the English jury springs".¹² Also known as the *recognitio*,¹³ the Norman inquest was initially a royal device of inquiry used for both fiscal and administrative purposes.¹⁴ The compilation of the Domesday Book, 1085-6, is a most conspicuous example of its use.¹⁵ The

⁵ See 3 Blackstone, 1768, p.379; 4 Blackstone, 1769, pp.342-44; 1 Pollock and Maitland, 1898, p.140. See also Devlin, 1956, p.164, where he argues that "trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." Also see Plucknett, 1956, p.107; Van Caenegem, 1973, p.73. And see Hay, 1988, pp.305-357.

⁶ Thayer, 1898, p.49; 1 Holdsworth, 1956, p.312; Foster, 1979, pp.281-3.

⁷ Thayer, 1898, p.49; 1 Holdsworth, 1956, p.312; Harding, 1966, pp.21-4; Van Caenegem, 1973, pp.63-3, 67.

⁸ See Deosaran, 1985, pp.9-10.

⁹ See Foster, 1979, pp.281-2. See also Harding, 1973, pp.29, 30-41.

¹⁰ Harding, 1966, p.38; Foster, 1979, p.282.

¹¹ Thayer, 1898, p.46; 1 Pollock and Maitland, 1899, pp.141-5; Maitland, 1908, pp.120-6; Plucknett, 1956, pp.106-38; Van Caenegem, 1973, p.73.

¹² 1 Holdsworth, 1956, p.312. See also 1 Pollock and Maitland, 1898, p.140.

¹³ Van Caenegem, 1973, p.133, n.30.

¹⁴ Plucknett, 1956, pp.110-11; Harding, 1966, p.38.

¹⁵ Douglas, 1964, pp.347-54; Baker, 1966, pp.183-5; Finn, 1973, pp.5-24.

compulsory *ex officio* oath was central to the operation of the *inquisitio*. With it Crown officials, by virtue of their office, commanded members of the gathered inquisition to answer truly to the questions propounded to them. The oath was seen as a device through which spiritual forces could be employed to meet the temporal requirements of the Crown and was considered to be a strong guarantor of veracity since all who were subject to the inquisitorial oath were presumed to have material knowledge of the facts in question.¹⁶ Indeed, on their assembly before officers of the King, those members of the inquisition who were ignorant of the facts at issue were required by their oaths to say as much and would therefore be excluded.¹⁷

Though originally a technique of royal inquiry, the inquest was also used to monitor the activities of royal officials, was granted to favoured individuals and was later used to inquire into the circumstances of crimes which were deemed to threaten the King's peace.¹⁸

Under Henry II (1154-1189) the inquisition was further extended beyond matters of direct and immediate concern to the administration of government by the Crown and became a "purchasable favour" granted to religious houses and to prominent or respectable individuals involved in private disputes.¹⁹ It thereby afforded those in receipt of this royal patronage a means of avoiding the procedures of the ancient tribunals, reliant upon the transcendental judgment of the spiritual rather than upon the terrestrial impressions of members of the local community charged by their oaths to surrender pertinent testimony.²⁰

Thus, before the development of distinct procedures specifically geared to cater for activities designated as criminal, the inquest had become a central feature of Norman centralised government. In its earliest form it required a body of neighbours summoned from the relevant community to answer, upon their oaths, as witnesses, before officers of the Crown, to questions of a proprietary and fiscal nature. It was later made available to individual litigants to eventually become an established part of the criminal law accusatory process at common law.²¹

¹⁶ Devlin, 1956, pp.6-8; Harding, 1966, p.24.

¹⁷ 1 Stephen, 1883, p.256.

¹⁸ *Ibid.*, p.255; Thayer, 1898, pp.50-1; 1 Pollock and Maitland, 1898, p.141; Maitland, 1908, pp.12-16, 121-5; 1 Holdsworth, 1956, p.313; Plucknett, 1956, pp.110-14; Van Caenegem, 1973, p.73.

¹⁹ Maitland, 1908, pp.121-5; Harding, 1966, p.39.

²⁰ Maitland, 1908, pp.10-11, 121; 1 Holdsworth, 1956, p.313.

²¹ 2 Pollock and Maitland, 1898, p.602; 1 Holdsworth, 1956, p.314.

Largely as a result of the extension of the availability of the inquest during the reign of Henry II, the ancient modes of proof, together with the local tribunals that administered them, began to be "gradually suppressed" as the common law, under the direction of the King and his delegates of itinerant justices began to be enforced.²² Though they varied in their application, the ancient methods of proof were almost entirely based on oaths and ordeals.²³ Paradoxically, under the older mode of trial proof was to follow judgment; the judgment determined which of the parties in dispute was to prove his case, the mode of proof and the consequence of failing to meet the requisite proof.²⁴ The system of oaths ranged from the single unsupported exculpatory oath of the individual challenged to meet the charge against him, to a procedure which required a certain number of oath-helpers or compurgators to support the oath of the defendant with that of their own.²⁵

Maitland suggests that the system of oaths was restricted to lesser crimes whilst graver charges required a "direct and open appeal to the supernatural, the case ... too hard for man ... is left to the judgment of God".²⁶ He describes the four chief forms of ordeal as follows:

The Ordeal of hot iron: the Accused is required to carry a hot iron in his hand for nine steps, his hand is then sealed up and the seal broken on the third day, if the hand is festered then he is guilty, if not, innocent; the Ordeal of hot water: the accused is required to plunge his hand into hot water, if the Ordeal is simple, to the wrist, if threefold, then to the cubit; the Ordeal of cold water: the accused is thrown into water, if he sinks he is innocent, if he floats he is guilty; the Ordeal of the morsel: a piece of bread or cheese of an ounce in weight is given to the accused, having been solemnly adjured to stick in his throat if he is guilty....²⁷

After the Conquest, however, the ordeal - with its reliance upon divine intervention rather than human action for the disposition of cases - was increasingly regarded with scepticism.²⁸ Foster argues that the Crown had begun to lose confidence in this method of

²² Maitland, 1908, pp.12-13, 115, 126.

²³ *Ibid.*, p.115.

²⁴ *Ibid.*; Levy, 1968, p.5.

²⁵ Maitland, 1908, p.115-17.

²⁶ *Ibid.*, at pp.119-22; see also Levy, 1968, p.6.

²⁷ Maitland, 1908, p.119.

²⁸ Thayer, 1898, p.38.

trial even before the twelfth century.²⁹ This scepticism appears to have contributed to the development of the inquisition from a device designed to ascertain and protect the proprietary and fiscal interests of the Crown, to a means of discovering and suppressing crime,³⁰ which through the imposition of fines and forfeitures was also a source of royal revenue.³¹

The assize of Clarendon, 1166,³² later buttressed by the assize of Northampton, 1176,³³ formally incorporated the *inquisitio* into the increasingly systematised machinery of criminal justice.³⁴ It required, for the preservation of the peace and the enforcement of justice, that inquiry be made in every county, hundred and vill of twelve lawful men or knights representing the community. The twelve were charged by their oaths to "present" before the itinerant justices of the King any accused or notorious criminals or harbourers of them. Those accused in this manner were to be put to trial by ordeal.³⁵

Thus, by the assize of Clarendon and that of Northampton the Crown formally institutionalised the jury of presentment which, as the grand jury, survived in its basic form, until the twentieth century.³⁶ By these measures the Crown articulated its vested interest in the administration of criminal justice. This interest is evident in the provision that required those individuals denounced by the community to abjure the realm within eight days even if they had passed the ordeal,³⁷ thereby indicating the Crown's distrust of the ordeal and, in the absence of an alternative method of determining issues, its presumption of guilt in respect of individuals suspected and accused of crime. In officialising accusations made by the community the Crown was also able to supplement the appeal of felony procedure, through which a private individual might bring a personal action against an appellee, which would normally be resolved through trial by combat

²⁹ Foster, 1979, p.285.

³⁰ Maitland, 1908, p.127.

³¹ 2 Pollock and Maitland, 1898, p.153; Plucknett, 1956, p.112; Levy, 1968, p.8.

³² Reproduced in Stephenson and Marcham, 1937, at pp.76-80.

³³ *Ibid.*, at pp.80-2

³⁴ 1 Stephen, 1883, pp.250-2; Thayer, 1899, p.55; Maitland, 1908, p.128; 8 Wigmore, 1961, pp.270-3; Plucknett, 1956, p.112; Devlin, 1956, pp.1-6.

³⁵ 1 Stephen, 1883, p.251; 2 Pollock and Maitland, 1898, p.152; Harding, 1966, pp.39-40.

³⁶ The Grand Jury was abolished by s.1(1) of the Administration of Justice (Miscellaneous Provisions) Act, 1933 and the Criminal Justice Act, 1948.

³⁷ Chapter 2 of the Assize of Clarendon, reproduced in Stephenson and Marcham, 1937, p.77.

between the accuser and the accused. By placing the community under an obligation to present suspected persons before its officials, the Crown was no longer dependent on the initiative of private individuals prepared to mount an appeal. Indeed, Maitland³⁸ suggests, the appeal system - once the principal method of initiating proceedings³⁹ - began to be threatened from the late twelfth century as appellees were increasingly successful in seeking from the Crown the privilege of answering appeals instituted against them through the common voice of their neighbours, the presentment or inquest jury. The evolution of the inquest into the jury of final decision, however, resulted from the demise of the ordeal in the thirteenth century. This effectively deprived the prevailing criminal procedure of a means of trying persons accused of crime.

The Emergence and Legitimisation of the Petit Jury

The petit jury appears to have developed as an expedient means of ascertaining the truth of an accusation in the face of the gradual de-legitimisation of the ordeal which had, during the thirteenth century, become discredited and had fallen into disuse.⁴⁰ Instrumental in the demise of the ordeal was a decree issued by Pope Innocent III, through the Fourth Lateran Council, in 1215. This prohibited the performance of religious ceremonies by members of the clergy in connection with the ordeal in all jurisdictions where the authority of the Council was recognised. It effectively abolished the ordeal as a regular means of trial since the procedure was thereby deprived of the requisite religious sanction that gave it its validity.⁴¹ This decree, as Foster remarks, "threatened to cast the entire English Criminal justice system into confusion".⁴² The repudiation of trial by ordeal therefore meant that an accusation by the presenting jury became, as Stephen observed, "practically equivalent to a conviction".⁴³ It is not clear whether in these circumstances presenting juries became loath to indict suspects in the absence of formal trial procedures. However,

³⁸ Maitland, 1908, p.129. See also 1 Stephen, 1883, p.254.

³⁹ Thayer, 1898, p.245.

⁴⁰ 1 Stephen, 1883, p.253.

⁴¹ Thayer, 1898, pp.68-9; 1 Holdsworth, 1956, pp.321-2; Plucknett, 1956, pp.118-9; Devlin, 1956, p.9; Foster, 1979, p.288.

⁴² Foster, 1979, p.288.

⁴³ 1 Stephen, 1883, p.254.

in direct response to the prevailing uncertainty, Henry III, in 1219, issued a writ to his justices, which read:

The King to his beloved and faithful ... Justices Itinerant ... greeting: Because it was in doubt and not definitely settled before the beginning of your eyre, with what trial those are to be judged who are accused of robbery, murder, arson, and similar crimes, since the trial by fire and water has been prohibited by the Roman Church, it has been provided by our council that, at present, in this eyre of yours, it shall be done thus with those accused of excesses of this kind; To wit, that those who are accused of the aforesaid greater crimes, and of whom suspicion is held that they are guilty of what whereof they are accused, of whom also, in case they were permitted to abjure the realm, still there would be suspicion that afterwards they would do evil, they shall be kept in our prison and safeguarded, yet so that they do not incur danger of life or limb on our account. But those who are accused of medium crimes, and to whom would be assigned the ordeal by fire or water, if it had not been prohibited, and of whom, if they should abjure the realm there would be no suspicion of their doing evil afterwards, they may abjure our realm. But those who are accused of lesser crimes, and of whom there would be no suspicion of evil, let them find safe and sure pledges of fidelity and of keeping our peace, and then they may be released in our land.... We have left to your discretion the observance of this aforesaid order ... according to your own discretion and conscience.⁴⁴

This response to the crisis brought about by the repudiation of the ordeal makes clear that proof of guilt was to be abandoned. The justices were to be guided by their own discretion in deciding whether the accused should be imprisoned, exiled or bound over. Posited upon a presumption of guilt, the order merely required the justices of the Crown, in the interest of keeping the peace, to determine the appropriate punishment, without testing the accusation. It seems, however, that some justices were too zealous in their exercise of this power.⁴⁵ Various other devices were attempted to fill the void left by the demise of the ordeal. Nonetheless, by a gradual and piecemeal process, the petit jury, an excrescence of the presenting jury,⁴⁶ became the predominant determinative institution in cases of serious crime.⁴⁷ "By its intrinsic fairness", Thayer commented, "as contrasted with older modes,

⁴⁴ Reproduced in Plucknett, 1956, p.119; see also 1 Holdsworth, 1956, p.323.

⁴⁵ Foster, 1979, p.289.

⁴⁶ Wells, 1911, p.348.

⁴⁷ 1 Holdsworth, 1956, p.324; Plucknett, 1956, pp.119-26; Devlin, 1956, p.10; Langbein, 1974, p.75; and see Groot, 1988, pp.3-35.

and by the favour of the Crown and the judges, it grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed".⁴⁸

The purpose of the jury of presentment, as originally conceived, was to testify to whether the accused was properly suspected, and not to convict or acquit accused persons. During this period, however, judges began to expect it to render a verdict.⁴⁹ While practice varied, it seems that judges frequently convened representatives from adjacent townships or jurors from a neighbouring hundred to validate the verdict of the jury of presentment.⁵⁰ The Medieval practice of seeking a series of verdicts from different juries, or of enlarging the presenting jury, flourished in the thirteenth century, thereafter it began to be regarded as too cumbersome.⁵¹ Gradually, only twelve petit jurors were selected, frequently from the original presenting jury, to try the indictment. The figure of twelve, Levy explains, resulted from the analogies drawn with the jury of presentment and the number of jurors that formed the jury in civil cases.⁵²

The consent of the accused was crucial to legitimate the operation of this novel method of trial.⁵³ Evidently, when a defendant refused to put himself upon his country, this was not, therefore, to be construed as amounting to a confession of guilt.⁵⁴ This is noteworthy because it implies that confessions of persons accused of involvement in criminal activity had a limited role in a context in which the petit jury struggled against the older modes of trial for legitimacy. The procedures of the ordeal were not dependent upon the confession of the accused since the verdict was left to the divine judgement of the supernatural. For this reason the Crown may have been reluctant to convict accused persons without some legitimate form of trial, even where the accused confessed his guilt. Only by gaining the consent of the accused could the officially sanctioned form of trial be legitimated. Thus, while jury trial appears to have existed as a purchasable royal favour and an alternative to trial by ordeal,⁵⁵ with the decline of the ordeal as a mode of trial, measures were

⁴⁸ Thayer, 1898, p.60.

⁴⁹ Levy, 1968, pp.15-6; Groot, 1988, pp.21-35.

⁵⁰ Levy, *ibid.*

⁵¹ Wells, 1911, p.358.

⁵² Levy, 1968, p.16.

⁵³ Thayer, 1898, p.73; Wells, 1911, p.353; Foster, 1979, pp.291-3.

⁵⁴ Thayer, 1898, p.73.

⁵⁵ Thayer, 1898, p.60; Foster, 1979, p.290.

introduced, from the early thirteenth century, to impose it upon accused persons.⁵⁶ However, the imposition of trial by jury was frequently resisted by persons accused of crime who, Foster argues, objected to being condemned merely by the general suspicions of their neighbours.⁵⁷ The accused, at this time, was prevented from swearing his innocence on oath and from having the case against him tested by an appeal to the divine. He was confronted with a body composed of his neighbours, often drawn from the very presenting jury that had indicted him, and had no power to object to the presence of neighbours who might be hostile to him. While jurors were selected on the basis of their character as witnesses, Wells suggests that in most cases they were prejudiced witnesses.⁵⁸ Also, if convicted of a felony, the accused would in effect disinherit his family since his land would escheat to his lord and his chattels would be forfeited by the King.⁵⁹ If convicted as a traitor, the accused was considered to have broken his obligation of allegiance to the Crown, his goods, land, profits, life interests and estates in fee simple, therefore, would be forfeited by the Crown.⁶⁰ Such considerations appear to have caused large numbers of accused persons to reject the new method to trial.⁶¹

The problem posed by recalcitrant suspects refusing to submit to the newly legitimised means of trial forced the King's justices to resort to the Writ of 1219.⁶² However, the increasing number of refusals occasioned the introduction of yet greater coercive measures. The solution imposed by the Crown is found in the first Statute of Westminster of 1275 which provides:

that notorious felons who are openly of evil fame and who refuse to put themselves upon inquest of felony at the suit of the King before his justices, shall be remanded to a hard and strong prison [*en le prison forte et dure*] as befits those who refuse to abide by the common law of the land; but this is not to be understood of persons who are taken upon light suspicion.⁶³

⁵⁶ Maitland, 1908, p.129; Plucknett, 1956, p.120; Levy, 1968, p.17; Foster, 1979, 291.

⁵⁷ Foster, 1979, p.291.

⁵⁸ Wells, 1911, p.352.

⁵⁹ Foster, 1979, p.293.

⁶⁰ Veall, 1970, p.3.

⁶¹ Wells, 1911, p.353.

⁶² *Supra.*, n.44.

⁶³ 1 Statute of Westminster, 3 Edw.1, c.12 (1275)

In its subversion of the requirement of consent the statute reflects the determination of the Crown to control criminal activity, particularly that of convicted felons, and to ensure that those suspected or accused of involvement in crime were convicted by petit jury trial. Though it specifically excluded from its ambit those individuals who attracted only "light suspicion", it nonetheless, required all other suspected felons to be subject to a form of preventive detention prior to their trial. The sanction was designed to coerce suspects into submitting to petit jury trial and to further legitimate trial by jury as part of "the common law of the land". However, it is not clear whether this method of compulsion was restricted to eliciting the consent of accused persons, or whether it was also used to coerce confessions from those to whom great suspicion attached in order to confirm or substantiate the "truth" of that suspicion. For Ratushny, there is a close relationship between this form of coercion, as it later developed, and that of torture:

... the words "prison forte et dure" by some unaccountable means became transformed into "pein forte et dure", and finally into a form of torture which, by the sixteenth century, took the barbarous form of placing the accused between two boards and piling weights upon him until he accepted trial by jury or expired....⁶⁴

The circumstances in which *pein forte et dure* was invoked depended upon the gravity of the alleged offence. Morgan suggests that where the individual was accused of treason or misdemeanour, his recalcitrance was treated as if he had pleaded guilty to the charge and was, therefore, subject to the prescribed sentence.⁶⁵ It would appear then that *pein forte et dure* was limited in its application by the terms of the statute of Westminster, 1275, where it originated as *prison forte et dure*, to persons suspected and accused of felony.

The view that *prison forte et dure* was corrupted into a form of torture is supported by evidence provided by a recent study of the development of the *pein forte et dure* conducted by Summerson.⁶⁶ This study suggests that a refusal by the accused to submit to the common law absolved the officials having charge of the accused of any responsibility should their prisoner perish in custody. In these circumstances Medieval gaolers were given "an almost entirely free hand in any future treatment of him they felt inclined to

⁶⁴ Ratushny, 1979, p.126.

⁶⁵ Morgan, 1949, p.12.

⁶⁶ Summerson, 1983, pp.117-25.

apply."⁶⁷ The officials were, therefore, free to compel their prisoner to disclose information which would facilitate the process of prosecution and conviction. As their practices were shielded from public scrutiny, the precise nature of their treatment of suspects must remain largely unknown. Nonetheless, the *pein forte et dure*, described by Lord MacDermott (1957) as "an act of torture"⁶⁸, was a manifestation of the capacity of the Crown to impose its will. It can, therefore, be considered to be a form of torture in that under its operation the accused could legally be physically coerced into acquiescence. Certainly, during this period torture, as part of the criminal process, was widespread in Continental Europe⁶⁹ and instances of its use in England, not only in cases of treason but also of felony, have been recorded most notably by Jardine⁷⁰ and later by Langbein.⁷¹

Langbein contends that while the torture of suspects became a common characteristic of the Roman cannon law requirement of proof as practised on the Continent, the development of the jury system in England, based on the collective judgment of the community, precluded any systematic reliance on torture. This is because the English system rather than relying upon a formal system of accumulated proofs sufficient to convict, relied on a process of persuasion. "To this day", he continues, "an English jury can convict a defendant on less evidence than was required as a mere precondition for interrogation under torture on the Continent".⁷² Langbein finds a "crucial distinction" between torture and *pein forte et dure*. In the latter case, he argues, "coercion was not being used to extract information, to gather evidence", rather it was used to extort a plea. Therefore, *peine forte et dure*, Langbein suggests, is "best regarded as a special kind of guilty plea".⁷³ Torture, on the other hand, he maintains, presupposes a legal system based upon "rational" procedures geared to the discovery of "the truth", utilising as part of its fact finding exercise, torture as a "means of regulated coercion".⁷⁴

⁶⁷ *Ibid.*, p.122

⁶⁸ MacDermott, 1957, p.17; see also Williams, 1963, pp.12-3.

⁶⁹ See Peters, 1985, pp.47-60, 90-1.

⁷⁰ Jardine, 1837, pp.13-4, 16, 52-3.

⁷¹ Langbein, 1977, pp.81-129.

⁷² *Ibid.*, p.78; see also 4 Holdsworth, 1945, p.528.

⁷³ Langbein, 1977, p.77.

⁷⁴ *Ibid.*

The distinction drawn by this argument is extremely fine, if not illusory. It may be conceded that in its original form *peine forte et dure*, which thrived from the late thirteenth century and was not abolished until 1772,⁷⁵ was used to coerce pleas. However, while the official use of torture did not become a routinised aspect of English criminal procedure,⁷⁶ in the absence of any established procedural safeguards,⁷⁷ the *peine forte et dure* may have been adopted, in the application of Crown power upon the body of individual for the purposes of eliciting confessions, to secure convictions and to underpin the legitimation of the petty jury mode of trial.

The treatment of suspected felons who refused to plead, was, Levy believes, an "undoubted form of torture".⁷⁸ The argument advanced by Langbein assumes that the Crown through its officials acting as investigative agents, were capable, in advance of trial, of distinguishing between, firstly, those accused persons who were guilty and, therefore, to be compelled by means of torture to confess, and, secondly, those accused persons who, as the Writ of 1219⁷⁹ and the Statute of Westminster⁸⁰ suggests, were presumed guilty and were to be compelled only to plead. *Peine forte et dure* does not appear to contemplate the accused entering a plea of not guilty. Its affinity with torture, therefore, rests in the coercion of individuals, prior to trial, in a manner intended to elicit information detrimental to the interests of the suspect.

The distinction Langbein draws between the Continental and English systems of proof misses one vital element of congruity. While Continental legal systems, which relied upon an accumulation of degrees of proof for the legitimate conviction of defendants, may be contrasted with the English system - centred upon "persuading" the petit jury through argument - the two systems were concerned to secure legitimacy for their respective criminal procedures. Confessions played a crucial role in both systems, validating their corresponding procedures within increasingly centralised criminal justice machinery. This is evidenced by the frequency with which accused persons were subjected to severe measures of physical coercion, inflicted on them to force them to disclose their supposed

⁷⁵ 12 Geo.3, c.20, S.1 (1772). This statute provided that an accused standing mute to an indictment of felony could be convicted by verdict or confession. It was not until an enactment of 1828 (7 & 8 Geo.4, c.28) that the courts were directed to enter a plea of not guilty for the accused who stood "moot of malice".

⁷⁶ Langbein, 1977, p.80.

⁷⁷ *Ibid.*

⁷⁸ Levy, 1968, p.33.

⁷⁹ *Supra.*, n.40.

⁸⁰ *Supra.*, n.60.

guilt and to safeguard the authority of the Crown. The use of torture to secure confessions of guilt may not have been as widespread in England as it was on the Continent, however, the utility of confessions for the purpose of legitimating the petit jury mode of trial and for authenticating the conviction of the accused was to be later acknowledge by Staunford, who regarded the confession as, "the best and surest answer that can be made in our law for quieting the conscience of the judge and for making it a good and firm condemnation".⁸¹

In summation, the historical evidence indicates that trial by jury in criminal matters derived from the *inquisitio* procedures introduced by the Normans and used to ascertain and protect royal proprietary and fiscal interests. These procedures were exploited by the Crown to oblige members of each hundred and vill within the Kingdom to identify and indict those within their community suspected of indulging in activity stigmatised as criminal. Activities designated by the Crown as infractions against its peace also served to strengthen ruling class conceptions of morality by uniting the community against suspected criminals and enjoining the whole community, in its capacity of presenting jury, to bring those suspected of crime to justice. The petit jury, a scion of the jury of presentment, emerged as a purchasable privilege. With the decline of the ordeal, it was imposed by authority of the Crown - as a matter of expedience rather than of principle - upon accused persons by means of physical coercion. It was a device with which the Crown effectively augmented its power to influence prosecutions, the collection of evidence and thus convictions. The resulting convictions also served to increment royal revenues. In its early form, the petit jury method of trial did not contemplate protections for the individual but, instead, significantly advantaged the Crown. Its imposition, rather than creating valuable rights for the accused, was seen as depriving the accused of the valuable right to be tried by the older modes of trial.⁸² The ancient modes of proof and trial, based upon local customary laws, were displaced by procedures controlled by the Crown in which the individual, without the aid of witnesses or of counsel, could be accused and condemned by his neighbours on the basis of their assessment of his character.

Confessions had an important structural function in legitimating the petit jury mode of trial. With the repudiation of the ordeal and the demise of the local communal tribunals the jury of presentment - whose members were, in effect, to operate as informants - condemned the accused, since, in the absence of alternative trial procedures, its

⁸¹ Staunford, 1607, 11 c.51.

⁸² 1 Holdsworth, 1956, p.296; Foster, 1979, p.296.

indictments sufficed to secure convictions.⁸³ Confessions grew in functional importance from a role, under the ancient modes of trial, concerned essentially with affording the condemned individual an opportunity to atone for his sins and redeem himself for the edification of the community before the divine, in a purgatorial exercise of contrition. Under the centralising policies of the Crown, the confession was transformed into a instrument with which to legitimate the punishment of the "guilty". The widespread and systematic official use of torture may have been precluded by the establishment of trial by petit jury. However, the determination of guilt by jury increased the utility of confessions which, as evidence probative of guilt, were frequently extorted to legitimate the "good and firm"⁸⁴ conviction of accused persons as well as to legitimate the centrally imposed and controlled common law structures of criminal justice.

Under the early Anglo Saxon criminal procedures the role of the court was limited to determine the mode of trial, rather than to determine guilt or innocence. It was not dependent upon the presentation of evidence. Verdicts centred on the intervention of the divine. "The judges or doomsmen were merely guardians of a ritual performance, who at most decided by which of a number of mechanical means the defendant should try and clear himself."⁸⁵ In the operation of these ancient procedures, therefore, there was no reliance upon self-incriminatory admissions from accused persons and no special necessity to obtain them. The development of the trial by jury procedure increased the need for the criminal justice process to acquire evidence suitable for use at trial. It therefore evolved procedures geared to the acquisition of self-incriminatory evidence.⁸⁶ The advent of the petit jury mode of trial, therefore, elevated the confession into its position of decisive importance within the machinery of criminal justice.

⁸³ Wells, 1911, p.354.

⁸⁴ *Supra.*, n.81.

⁸⁵ Harding, 1973, p.16.

⁸⁶ Levy, 1968, pp.7-10; Berger, 1980, pp.4-5.

COERCED CONFESSIONS AND DUE PROCESS REACTIONS

Introduction

Under the Norman administration, the emerging system of criminal justice was based upon the assertion of central authority which required local customs and private vengeance to be subordinate to the officially sanctioned institutions and methods of adjudication.¹ The confession of persons suspected and accused of involvement in crime played a vital instrumental and legitimating role within the developing centrally administered common law structures of criminal justice. From the Medieval period the legitimating function of confession evidence was replicated in institutions, operating largely outside the common law, established to preserve the orthodoxies of Church and State. These institutions employed *inquisitio* methods which negated the formal accusatory and trial procedures required by common law. Under the authority of the rigorous law enforcement policies of the Tudor state, the inquisitorial methods, concerned primarily with the suppression of religious and political offences, began to complement the common law criminal justice process. With the spread of political and constitutional dissent, together with the growing secularization of English society, the prerogative government of the Stuart state further extended the use of inquisitorial methods.

During these developments, the role of the confession of suspected or accused persons was secured as being of pivotal importance in the administration of criminal justice. Inquisitorial procedures were employed both internally and extraneously to the common law and were geared to the acquisition of self-incriminatory evidence. The confession, thereby, served to legitimate inquisitorial and non-inquisitorial methods of determining guilt. The confession also operated to legitimate the authority of the Church and Crown and their efforts to preserve the prevailing socio-political order. The regulation of social behaviour by the Church and the Crown was in turn reinforced by their control of those institutions, staffed by their agents, charged to enforce social values. The inquisitorial procedures practised by these institutions were designed to police, identify, accuse and condemn elements considered inimical to their ideological and political interests and to further preserve the power of the Crown and the Church.

Thus, during the period under consideration, confession evidence may be seen as playing an important role in legitimating not only the procedures utilised to convict suspected individuals but also the authority of the state and its institutions of social and crime

¹ Harding, 1966, p.21.

control. As part of the legitimation project, coercive measures, including torture, however slightly distinguished from the *peine forte et dure*, were practised as routine features of the administration of criminal justice to extract from both witnesses and accused persons evidence and confessions.²

By the beginning of the seventeenth century these inquisitorial practices coupled with the extraordinary power of the Crown to authorise the use of torture, were increasingly vilified as being in contravention of the principles of common law. The opposition to inquisitorial practices developed into popular discontent which began to articulate itself in a concerted movement for law reform. During the course of the century this popular movement led to the formal denunciation of inquisitorial methods, the abolition of the Crown-erected courts employing these methods and to the strengthening of the accusatory and trial procedures of the common law. However, in spite of the endorsement of the common law, its procedures also became the subject of popular disquiet. The confession, though no longer extorted by force under the authority of the royal prerogative, retained its crucial legitimating function.

In short, while the common law courts began, from the late 1600s, to accord defendants a right not to incriminate themselves under judicial questioning, and in so doing acknowledged that the inquisitorial examination of defendants was incompatible with the reconstruction of judges as disinterested umpires, the pre-trial process continued to facilitate the construction of cases against suspected or accused persons based upon evidence acquired under compulsory interrogations conducted in private by partisan state agents. Thus, as this and the following chapters make clear, while challenges to the legitimacy of convictions founded upon confessions elicited from defendants by judges would ultimately lead to the repudiation of compulsory judicial examinations, the growing reliance placed upon confessions extracted from suspected and accused persons prior to trial would in turn place new and increasing strains upon the on-going project to preserve the role in the criminal process of confessions as sufficient evidence of guilt and to legitimate structures specifically designed to secure them.

Medieval Developments: Inquisition and Accusation

William the Conqueror, by the beginning of the twelfth century, had brought an end to the Anglo-Saxon practice which permitted Bishops to sit in a judicial capacity entertaining

² Leavy, 1968, pp.34, 39; Veall, 1970, p.25.

suits in the local communal courts.³ The Conqueror, with the advice of his council, required the Bishops to confine their judicial activities to ecclesiastical matters in accordance with canonical laws. Consequently, Wigmore remarked, there "sprang up a separate system and a double judicature".⁴

The Fourth Lateran Council of 1215 which, under Pope Innocent III, had effectively rendered the ordeal redundant, also handed down the details for the introduction of *inquisitio* procedures in those jurisdictions, including England, taking cognizance of its ecclesiastical authority.⁵ Trial by ordeal was losing its status as the primary mode of reaching final decisions and trial by compurgation oath was "already little better than a farce".⁶ The inquisition and the *ex officio* oath were introduced into ecclesiastical practice as an innovation advanced under canonical authority to replace the previously prevailing methods of church trial.⁷ The compurgation oath was considered flawed since it "operated of itself as a decision, through the party's own act".⁸ The inquisitorial oath of the ecclesiastical inquisition by comparison, compelled those suspected of violating Roman canon laws to testify to their guilt.

It seems, however, that in its earliest form this inquisitorial process acknowledged a requirement of a specific accusation. Moreover, it was only with such an accusation that the *inquisitio* procedure could be legitimately activated. The accusation could, however, be made secretly to ecclesiastical officials. Upon receiving an allegation from accusing witnesses church officials would decide whether the accusation warranted the attendance of the accused before an inquisition convened to inquire into the particulars of the allegation. Nevertheless, as the ecclesiastical inquisitional procedures and the attendant *ex officio* oath evolved the preliminary requirement of a specific accusation was discarded.⁹ Increasingly, these procedures were utilized under the initiative of church officials to probe into the minds and activities of individuals suspected of holding heretical beliefs in an effort to secure evidence and confessions sufficient to ensure the conviction of the "guilty" and to fortify the authenticity of such convictions.

The *ex officio* oath of the ecclesiastical inquisition was developed in the church courts of England after 1236 under the leadership of cardinal Otho, who became, after Henry III had

³ Wigmore, 1902, p.611; Harding, 1966, p.35.

⁴ Wigmore, 1902, p.611; see also 1 Pollock and Maitland, 1898, pp.66-7, 432. This was later to become a source of a prolonged jurisdictional conflict over the delimitation of papal and regal power, see Wigmore, 1902, pp.611-25; Harding, 1966, pp.35-6.

⁵ Ratushny, 1979, p.161; see also Wigmore, 1902, pp.613-16.

⁶ Thayer, 1898, p.37.

⁷ Wigmore, 1902, pp.614-5.

⁸ *Ibid.*, p.615.

⁹ Wigmore, 1902, pp.616-19; Ratushny, 1979, pp.161-2.

married his niece, the Archbishop of Canterbury.¹⁰ Under Otho the procedures of the ecclesiastical inquisition diverged with the prescribed practices that were emerging under the common law. The latter incorporated within its formal procedures the requirement of a specific accusation in cases of serious crime either by an individual, by appeal of felony, or by the community represented by the jury of presentment. Trial by a jury of neighbours was, by this stage, also beginning to be established as a key element of the common law criminal justice process. Wigmore considered the path taken by the ecclesiastical courts to be "an epochal difference of method", and found, "the radical part played, for the progress of English procedure, by the new jury trial in the 1200s and early 1300s, was paralleled, in a near degree, for ecclesiastical procedure, by the inquisitorial oath in the 1200s".¹¹

The jurisdictional conflict between Church and Crown re-emerged in the middle of the thirteenth century as a result of the religious activities of the Bishop of Lincoln. The bishop, Morgan (1949) relates,¹² engendered resentment within his diocese after he had instituted inquisitorial examinations "into the conduct and morals of both the great and humble" in the community. The "bitter complaints" of the community induced the King to command the local sheriff not to permit any laymen to appear before the bishop or his officials to answer such interrogatories on oath except in causes touching testaments or matrimony. The bishop defied the express wishes of the King and was subsequently called "to appear before the King and his justices to show why he had caused laymen and laywomen to be summoned to take the newly devised oath." Morgan also records that the example of the Bishop of Lincoln was followed by the Bishops of Gloucester and of Worcester. To counter this development, the Crown, by the statute *Articuli Cleri*, 1315-16,¹³ placed definite limits on the jurisdiction of ecclesiastical officials. The statute restricted the authority of the church to conduct investigations or examinations of laymen under the inquisitorial oath to matrimonial and testamentary matters. This action, however, may not have been inspired solely by the complaints voiced by the community in opposition to the use made by the ecclesiastical courts of the *ex officio* oath procedure. Wigmore suggests the Crown was rather more concerned to circumscribe the extensive jurisdiction the church courts sought for themselves and to strengthen its own authority.¹⁴ Evidence affording support to this argument is provided by Leadam and Baldwin (1918).¹⁵

¹⁰ See 1 Pollock and Maitland, 1898, pp.93-103; Wigmore, 1902, p.611; Ratushny, 1979, p.162.

¹¹ Wigmore, 1902, p.615.

¹² Morgan, 1949, pp.1-3.

¹³ Statute *Articuli Cleri* 9 Edw.2 (1315-16). Wigmore (1892, pp.74-5) regarded this statute as the source of the modern privilege against self-incrimination. It was, he argues "the earliest legal opposition" erected to combat the imposition of the inquisitorial oath.

¹⁴ Wigmore, 1902, pp.612-3. See also Levy, 1968, p.44.

¹⁵ *Select Cases Before the King's Council, 1243-1482*, Vol.35.

Their work reveals that during the period under discussion the King's council was using similar inquisitorial methods in respect of cases brought before it for adjudication. Under its procedures the accused was required to appear before the council in person and without legal representation to "answer the charges, which were most likely not known to him in advance.... If he did not immediately confess or satisfactorily explain the charges, he was put to the method known as the interrogatory examination.... It was a method that was creeping into secular practice, in the courts of King's bench and common pleas, as early as the reign of Edward I.... As practically administered the examinations were of several kinds or degrees, according to the nature of the case and the advancement of the art of questioning."¹⁶

In spite of the statute of 1315-6, the House of Commons found it necessary to protest against the forced subjection of accused and suspected persons to the inquisitorial procedures of both the ecclesiastical courts and the King's Council. The King, in 1347, responded with an assurance that the practice would be discontinued, unless there were sufficient grounds with which to justify its use.¹⁷ The protestations, it would seem, continued since, some four years later, a statute was passed which invoked the Magna Carta and provided that, "from henceforth none should be taken by petition or suggestion made to our Lord the King, or his Council, unless it be by the indictment or presentation of good and lawful people of the same neighbourhood ... in due manner, or by process made by writ original at the common law".¹⁸

The objections to which this statute was addressed appear to have been based not on the application of the inquisitorial oath but rather on its use without the prerequisite of a specific accusation.¹⁹ By this enactment, the Crown formally acknowledged the common law due process requirement of accusation as a precondition for trial and purported to contain the operation of inquisitorial methods. In so doing the Crown apparently accepted that inquisitorial procedures were not legitimate methods upon which to conduct criminal inquiries. However, inquisitorial methods were not eliminated. They continued to be employed by the ecclesiastical courts under the authority of Roman canon law, they were to re-emerge within the practices of the prerogative courts of the Crown and, finally, inquisitorial procedures appeared within the procedures of the common law criminal justice process.²⁰ This would seem to indicate the emergence of a cleavage between the rhetoric of the ordinances promulgated by the Crown and the reality of the operation of the

¹⁶ *Ibid.*, p.xiii; see also Morgan, 1949, p.4.

¹⁷ 11 *Rotuli Parliamentorum* 168, item 28 (1347); see Morgan, 1949, p.4.

¹⁸ 1 Statutes of the Realm (iv) pp.319-21 (1351); see also Morgan, 1949, p.4.

¹⁹ Ratushny, 1979, p.167.

²⁰ *Ibid.*, p.166.

institutions of social control authorised to convict and punish violations of legal and canonical order. "Legal niceties", Professor Levy has observed, "procedural regularities, and forms of law counted for little when the objective was to obtain a conviction at any cost...."²¹

The ecclesiastical authorities were not content with the jurisdictional limitation placed upon them by the statute *Articuli Cleri*, through which the Crown legitimated the *ex officio* oath inquisitorial procedures followed by church courts provided they obtained within matters testamentary and matrimonial.²² Undeterred, canonists campaigned for and succeed in acquiring concessions from the Crown, extending their jurisdictional authority over the laity.²³ From the end of the thirteenth century the clergy were becoming increasingly preoccupied with alleged heresies. In 1401 the church received statutory support for its zealous mission when the ecclesiastical courts were given authority by the statute *De Haeretico Comburendo*²⁴ to burn convicted heretics at the stake.²⁵ The statute was designed to suppress the heretical preachings of the Lollards. It provided for the arrest of any person suspected of or denounced as holding heretical views. The suspect was then to be imprisoned until he "canonically purged himself, and abjured the heretical opinions".²⁶

During the fifteenth century the ecclesiastical courts worked in close cooperation with the Crown, its Council and increasingly with the common law courts.²⁷ In the absence of enforceable common law accusatory procedures within the conciliar and ecclesiastical courts, the *inquisitio*, with its compulsory inquisitorial oath, developed to become a weapon of political and religious suppression.²⁸ The procedures utilized by these courts were such that suspects could be tried and convicted by secret examination before officials of the Church and Crown. Suspects were examined without any knowledge of the charges against them, of the nature of the evidence, or of their accusers, in a manner designed to extort evidence and confessions of guilt and, therefore, to obtain convictions. The confessions of both witnesses and accused persons became a central element of this process. Later these confessions were increasingly being extracted by means of torture. Confessions obtained under this process were conducive to the efficient operation of

²¹ Levy, 1968, p.26.

²² Wigmore, 1902, pp.618-19.

²³ Morgan, 1947, pp.5-7.

²⁴ Statute *De Haeretico Comburendo* 2 Hen.4, c.15 (1401).

²⁵ Wigmore, 1902, p.618; Ratushny, 1979, p.162.

²⁶ Morgan, 1947, p.5; see also Wigmore, 1902, p.618. The statute of 1401 was supplemented in 1414 by a second (2 Hen.5, c.7) which provided for the turning over to the ecclesiastical authorities any person indicted at common law for heresy.

²⁷ Morgan, 1947, p.6.

²⁸ Ratushny, 1979, p.163.

procedures geared to the prosecution and conviction of alleged offenders. They served to furnish the authorities with virtually unassailable material with which to legitimate convictions. They also operated to underline and preserve the authority of the powerful establishment, its values, policies, influence and institutions which were empowered to manage socially and politically acceptable beliefs and conduct. Once compelled to confess, accused persons would be required to "freely" repeat their confession in open court. Failure to do so would frequently attract further coercive measures to secure compliance²⁹. The appearance of spontaneous avowals of guilt behind the private application of direct physical compulsion, gave the public proceedings a veneer of legitimacy to both sanitise those proceedings and to authenticate the punishments meted out by the court.

Levy describes the work of the ecclesiastical courts under the statute of 1401 as follows:

The indictment was built from the testimony of secret informers, malicious gossips, self-confessed victims, and frightened witnesses who, anxious to save themselves from being racked, revealed from their frantic imaginations whatever they thought the inquisitor might wish to hear. Convicted heretics whose infamy disqualified them as witnesses in all other cases, gave the most prized testimony in heresy cases, but they could testify for the prosecution only. A prisoner who confessed, abjured heresy, and proclaimed his penitence could prove his sincerity - and escape the stake if not prison - by betraying friends, neighbours and family. If he refused, the inquisitor considered him impertinent and put him to torture again to reveal their guilt - and then dispatched him for execution.³⁰

The inquisitorial procedures of the ecclesiastical courts, and those of the councillor courts, were again to become the object of popular disquiet in the early sixteenth century.³¹ During the reign of Henry VIII, the Crown once again responded to widespread public opposition to the inquisitorial oath procedure derived from the canon law of papal Rome and the civil law of imperial Rome.³² In 1533 an Act for the punishment of heresy insisted that every person presented or indicted of any heresy or duly accused by two lawful witnesses, "shall and may after every suche accusacion or presentment and none otherwyse nor by any other meanes be cited convented arrested taken or apprehended ..." be committed to answer, "in open Courte ... to their accusation and presentmentis".³³ The statute seems to have again intended that any persons suspected or accused of heresy

²⁹ Levy, 1968, pp.26-30.

³⁰ *Ibid.*, p.28. On the interrogatory practices of the ecclesiastical courts also see Horowitz, 1958, p.126.

³¹ Beard, 1904, pp.114-17; Morgan, 1947, p.6; Langbein, 1974 pp.71-4; Bellamy, 1984, pp.30-1.

³² Morgan, 1947, p.6; Levy, 1968, pp.45-82; Veall, 1970, p.11.

³³ 25 Hen.8, c.14 (1553).

should be convicted only after the prosecution had negotiated the common law due process procedures of formal accusation and public trial. However, Mary, who had succeeded Henry VIII to the throne in 1553, promptly repealed the 1533 statute³⁴ reviving the jurisdiction of the ecclesiastical courts. In the first year of the reign of Elizabeth the measures introduced by Mary in her response to the Henrician Reformation and to the Protestantism of Edward VI, were themselves repealed by the Act of Supremacy, 1558.³⁵ The Act restored to the Crown jurisdiction over the ecclesiastical, spiritual and secular state, "abolysing all Forreine Power repugnant to the same". It also reserved to the Queen the power by letters patent to authorise her Commissioners to investigate, "correct and amend all such errors, heresies scisms abuses offences contempts and enormities" by means of inquisitorial procedures designed to obtain confessions and to secure convictions.³⁶ The statute, therefore, formally transferred, from the ecclesiastical courts, to the Crown the administration of the religious inquisition.³⁷

The *ex officio* oath procedure became a characteristic feature of the investigations conducted by the Commissioners. This was expressly authorised by the Crown. Under the supervision of the Privy Council, the Commissioners formed the tribunal which became known as the Court of High Commission.³⁸ Though concerned primarily with heresy, the Court of high Commission began to extend its jurisdiction to other matters of ecclesiastical concern. Its jurisdiction also extended to include criminal matters that were under the purview of the common law. This was justified by virtue of the spiritual authority of commissioners claimed for themselves not only over members of the clergy but also the laity. The justification was based, quite simply, upon the consideration that every member of the community was putatively a member of the established church.³⁹

In accordance with the political and religious objectives of the Anglican Establishment, the Court of High Commission was empowered by fiat of the royal prerogative to inflict torture upon witnesses and accused persons to extract confessions.⁴⁰ The use of torture could only be authorised by the express written sanction of the sovereign or Privy Council.⁴¹ Its use, however, was not confined to offences such as high treason. Gradually, torture was extended to embrace common law offences such as murder and robbery.⁴² The

³⁴ 1 & 2 Phil. and Mar., c.6 (1554).

³⁵ 1 Eliz., c.1 (1558).

³⁶ *Ibid.* See Levy, 1968, p.76.

³⁷ Ratushny, 1979, p.165.

³⁸ Morgan, 1947, p.7; Veall, 1970, p.12.

³⁹ Veall, 1970, p.10.

⁴⁰ Levy, 1968, pp.83-103.

⁴¹ Jardine, 1837, p.67. See also Levy, 1968, pp.83-103.

⁴² Jardine, 1837, pp.35-58; Lowell, 1897-8, p.293.

individual brought before the court was not entitled to be informed of the source, nature or strength of the allegations made against him. The Court could intervene on the information of an aggrieved or interested party who would denounce his neighbour secretly, without fear of attracting the condemnation of the Court should that accusation prove unfounded. It could also initiate action against individuals solely on the basis of its own suspicions.⁴³ The High Commission Court was not governed by common law procedures, which - in requiring formal and public accusation before trial - would have militated against its mission to convict dissident members of the church.⁴⁴ The Court examined suspected and accused persons in secret under the *ex officio* oath. Those aspects of its operation open to the public, normally sentencing and punishment, served to publicise and, therefore, to legitimise the correctness of its judgements. *Ex officio* oath examinations might be undertaken on the basis of "mere suspicion", before specific charges had been preferred, permitting the construction of the case against the suspect who could be convicted on his forced and uncorroborated confession.⁴⁵ Refusal to answer *ex officio* oath interrogatories rendered witnesses and suspects liable either to financial sanctions or to imprisonment since, as Veall notes, "it was considered that an innocent man had no reason to refuse and was guilty of contempt of court".⁴⁶ Returned to prison, the Court could then seek from the Crown and its Council authorisation to employ torture. Indeed, the obstinate suspect could be examined before torture, under torture, between torture and after torture.⁴⁷ Adverting to the Elizabethan recourse to torture, Jardine commented:

Among other instruments of power which prerogative had placed at the disposal of the Sovereign, the torture was one peculiarly applicable to the discovery of the real or supposed treasons of religious fanatics; and ... there is no period of our history at which this instrument was used more frequently and mercilessly....⁴⁸

The Crown could not be required to justify its imposition of torture.⁴⁹ Its use, however, was denounced as being illegal and in contravention of the principles of the common law. On this basis, various legal commentators, such as Sir John Fortescue, in the fifteenth

⁴³ Veall, 1970, p.25; Levy, 1968, pp.126-7.

⁴⁴ Veall, 1970, p.23.

⁴⁵ Lowell, 1897-8, p.293; Veall, 1970, p.26.

⁴⁶ Veall, 1970, p.23.

⁴⁷ Morgan, 1949, pp.14-5; Veall, 1970, p.26.

⁴⁸ Jardine, 1837, p.26.

⁴⁹ *Ibid.*, pp.66-9.

century, Sir Thomas Smith in the reign of Elizabeth and Sir Edward Coke, opposed the administering of torture.⁵⁰

The torture of individuals took many forms including the use of the rack. Alternatively, the prisoner might be manacled, compressed or suspended by his thumbs from a beam. Confessions extorted by such measures were frequently made the sole basis for securing convictions.⁵¹

The Legality of Torture Questioned

In the early part of the seventeenth century the question of the legality of torture became the subject of judicial appraisal. At his trial in 1628, for the murder of the Duke of Buckingham, John Felton⁵² confessed his guilt. The court nonetheless pressed him further to "confess who set him to work to do such a bloody act". Felton maintained he acted alone. The Bishop of London, told him that if he did not confess he would be sent to torture by the rack. The case report relates that Felton replied, "if it must be so he could not tell whom he might nominate in the extremity of torture, and if what he should say then must go for truth, he could not tell whether his lordship (meaning the Bishop of London) or which of their lordships he might name, for torture might draw unexpected things from him: after this he was asked no more questions, but sent back to prison".⁵³

The King, who was present at the trial, sought the opinion of the Lord Chief Justice and all other judges as to the legality of the use of torture under the common law. The judges returned their unanimous opinion that Felton "ought not by the law to be tortured by the rack, for no such punishment is known or allowed by our law."⁵⁴ Evidently the King in this instance chose not to authorise the application of torture under his prerogative. Felton was subsequently tried, convicted and sentenced to death. The royal prerogative, however, sanctioned the use of torture throughout the period beginning with the Tudor monarchy through to the middle of the seventeenth century.⁵⁵ Confessions thus obtained were admitted "evidentially without scruple."⁵⁶ Its departure from common law procedures was

⁵⁰ *Ibid.*, pp.6-10. See also Veall, 1970, p.25.

⁵¹ Morgan, 1949, p.15; Veall, 1970, p.26.

⁵² *Felton's Case* (1628) 3 Cobb.St.Tr. 368. See also Jardine, 1837, pp.6-12.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Jardine, 1837, pp.58-9; Anon., 1964, pp.1036-7.

⁵⁶ 3 Wigmore, 1970, p.294.

justified on the basis that torture was exercised not as part of the common law but as part of the unreviewable prerogative of the sovereign.⁵⁷

Star Chamber

The royal prerogative also legitimated the use of torture in a tribunal of "an almost indistinguishable character" to that of the High Commission, the Court of Star Chamber.⁵⁸ This prerogative court developed as the judicial limb of the Privy Council, composed of the highest ranking noble and clerical officers of state.⁵⁹ It sat at Westminster in the "Starred Chambre", a room with its ceiling ornamented with stars, from which it may have derived its name.⁶⁰ The origins of the Court, however, have also been attributed to the Act *Pro Camera Stellata*, 1487.⁶¹ Barnes argues that a new conciliar court was indeed established by the 1487 Act. However, he suggests that by the early sixteenth century its composition so resembled that of the King's Council, that "administrative convenience" necessitated its absorption into the council sitting in the Star Chamber.⁶²

It was, nevertheless, under Elizabeth that the Court became active as a political institution,⁶³ replicating the inquisitorial procedures of the ecclesiastical courts,⁶⁴ to enhance the authority of the Crown.⁶⁵ Like the Court of High Commission, it was also empowered to subpoena any witnesses or suspect, for interrogation under the *ex officio* oath, to determine guilt without a jury of accusation or of trial and to convict persons by their coerced and uncorroborated confessions as if they had been condemned at common law.⁶⁶ It punished those who failed to answer its summons.⁶⁷ Its largely unspecified jurisdiction,⁶⁸ included the hearing of minor offences or misdemeanours,⁶⁹ the punishment of officials, contempt of other courts, the punishment of common law jurors who handed down verdicts considered perverse,⁷⁰ the adjudication of disputes between public bodies,⁷¹

⁵⁷ Jardine, 1837, pp.67-8; Langbein, 1977, pp.129-31.

⁵⁸ 1 Holdsworth, 1956, p.505.

⁵⁹ Morgan, 1949, pp.14-15; Harding, 1966, p.151.

⁶⁰ Maitland, 1908, p.261; Levy, 1968, pp.49, 100; Walker, 1976, p.12.

⁶¹ 3 Hen.7, c.1 (1487). See Harding, 1966, p.158.

⁶² Barnes, 1977, p.318.

⁶³ Wigmore, 1902, p.619; Phillips, 1939, p.115.

⁶⁴ Levy, 1968, pp.49-50.

⁶⁵ Veall, 1970, p.10.

⁶⁶ Bellamy, 1984, p.17.

⁶⁷ Levy, 1968, p.127; Veall, 1970, p.10.

⁶⁸ Maitland, 1908, p.263; Phillips, 1939, p.117; Barnes, 1977, p.317.

⁶⁹ 1 Stephen, 1883, p.337; see also Harding, 1966, pp.75, 159-54.

⁷⁰ Maitland, 1908, p.263.

and the preliminary examination of suspects often by means of torture authorised by the royal prerogative.⁷² Finally, the court could punish an individual for an offence even where another court had previously convicted and punished for that offence.⁷³ Under its inquisitorial procedures the accused was presumed guilty and carried the burden of proving his own innocence.⁷⁴

The commanding influence of the Crown over the Star Chamber entitled the Court to proceed against suspects *super confessionem*, when a prisoner confessed his guilt, or to proceed *pro confession*, when a prisoner persistently refused to answer questions put to him with an admission of guilt.⁷⁵ This enabled the Crown to accelerate the proceedings leading to the conviction of those it had a particular and immediate interest in condemning. The Star Chamber, like its ecclesiastical counterpart, invariably delivered its verdicts in public. While this served to legitimise its punishments, the crucial stages prior to conviction and sentence were conducted in private.⁷⁶

Nevertheless, there is some evidence to suggest that until the last decade of its existence the Star Chamber was held in high esteem. For example, Coke, in a comment made sometime before his death in 1634, regarded this instrument of Crown policy as "the most honourable court (our Parliament excepted) that is in the Christian world".⁷⁷ Its advantage to the Crown lay in its procedures through which, as Holdsworth remarked, it could get convictions "more effectually" than the ordinary common law courts.⁷⁸ However, it was the implementation of these procedures that would, by the middle of the seventeenth century, arouse sufficient enmity and opposition to cause the abolition of the Court and secure its place of notoriety in history as an instrument of Stuart despotism.⁷⁹

In the aftermath of the dynastic disputes associated with the protracted Wars of the Roses, Tudor authorities sought to strengthen the machinery of centralised government. To achieve this objective the Crown increased the severity of the criminal law and established new courts to operate alongside the traditional common law courts.⁸⁰ Under this policy courts of a similar nature to that of the Star Chamber came into existence in strategic parts

⁷¹ Harding, 1966, pp.151-3.

⁷² Lowell, 1897-8, p.294.

⁷³ Veall, 1970, p.10.

⁷⁴ *Ibid.*, p.22.

⁷⁵ Phillips, 1939, p.113; Levy, 1968, pp.269-70.

⁷⁶ Veall, 1970, p.22.

⁷⁷ 4 Coke, 1797, p.65, referred to in 1 Holdsworth, 1956, pp.505-6. See also Veall, 1970, p.10; Phillips, 1939, p.107.

⁷⁸ 1 Holdsworth, 1956, p.505.

⁷⁹ Phillips, 1939, pp.107, 124-31; Veall, 1970, p.10.

⁸⁰ Veall, 1970, pp.1, 10.

of the Kingdom.⁸¹ In putting witnesses and suspected persons to answer interrogatories under the *ex officio* oath, these courts followed the inquisitorial practices of the High Commission and Star Chamber courts.⁸² They were, in effect, instruments of central authority expressed through the agency of the Privy Council, which by the sixteenth century had become, "the most important organ of the State".⁸³ The regional courts were staffed by officers of the Crown enjoined to enforce its policies rather than by judges directed to administer the common law.⁸⁴ These officers, acting in the inquisitorial manner as both prosecutor and judge, could fortify their impressions of guilt by employing coercive measures to force the vital confession.⁸⁵ The investigative methods employed by these and the prerogative courts indicate that the machinery of English criminal law of this period had no hesitation in resorting to extreme measures of coercion, including torture, to extract confessions when the exigencies of criminal procedure required it.⁸⁶ The essentially extra-common law procedures commissioned by the Crown in these courts had a "decidedly inquisitorial cast".⁸⁷ Such procedures were of immense benefit to governmental and law enforcement policies pursued by the Crown. In supplementing the common law, these inquisitorial methods, Veall explains, were, "simpler, speedier, and cheaper than in the common law courts". The power of the Crown, therefore, to influence prosecutions and to secure convictions was heightened by its use of prerogative courts where "technicalities were less important, examination of witnesses was more efficient and there was no jury...."⁸⁸

The Common Law Courts

However, the power and influence of the Crown over the criminal process as manifest within the prerogative courts, was also evident within the common law criminal procedures,⁸⁹ which displayed inquisitorial characteristics in spite of the due process requirements of specific accusation, indictment and public trial.

⁸¹ The Council of the North which sat at York and the Council in the Marches of Wales are two examples. See Maitland, 1908, pp.263-4.

⁸² Wigmore, 1902, p.619.

⁸³ 4 Holdsworth, 1945, p.57.

⁸⁴ Maitland, 1908, p.263.

⁸⁵ Lowell, 1897-8, p.293-4.

⁸⁶ *Ibid.*, p.290. See also 9 Holdsworth, 1944, pp.198-9; Horowitz, 1958, pp.129-31; Levy, 1968, p.26.

⁸⁷ Lowell, 1897-8, p.294.

⁸⁸ Veall, 1970, p.37. See also Cheyney, 1913, p.746; Phillips, 1939, pp.107, 123, 128; Levy, 1968, pp.270-71; Ratushny, 1979, p.170; Berger, 1980, pp.12-14.

⁸⁹ Ratushny, 1979, p.116.

Under the prevailing common law criminal procedures a person accused of felony, when apprehended, was confined to prison until his trial. Bail was seldom granted. Once detained the accused was closely examined, *incommunicado*, on all aspects of the case against him, usually by a justice of the peace. The answers to his preliminary interrogation were written down to construct the evidence which would form the case for trial. This examination was conducted in the inquisitorial manner, though it seems the inquisitorial oath was not employed. The justice of the peace did not act as an impartial or disinterested arbiter of the evidence against the presumptively innocent. Rather, he acted as a partisan detective committed to assembling an impregnable case against the accused.

The purpose of the examination was to expose a man assumed to be guilty. A confession of guilt was, therefore, vital for the affirmation of this presumed guilt. The confession was decisive since alone, without corroboration, it sufficed to secure a conviction. The accused was not permitted a copy of the indictment and denied legal advice before his trial or legal representation at his trial. The evidence from witnesses for the prosecution was recorded in secret. The accused was not entitled to be present or permitted to challenge his accusers. He had no notice before trial of the evidence that was compiled against him. At trial the defendant was not permitted to call his own witnesses. There were no formal rules governing the admissibility of prosecution evidence. The prisoner, at his trial, would be further examined by the judge who based his "bullying" interrogation upon the depositions received from the preliminary examination.⁹⁰

The trial jury was subject to the authority of the Star Chamber. The regulation of the petit jury was defended as necessary to minimize the possibilities of bribery, intimidation or biased selection, and to protect jurors from the influence of local potentates.⁹¹ However, in practice the control exercised by the Star Chamber enabled the Crown to exercise its own influence to ensure prosecutions reached a successful conclusion. As Veall observed, "the odds were heavily weighted against the accused and the trial was regarded as a conflict between the State and its enemies rather than an impartial inquiry into the guilt or innocence of the accused".⁹² It is clear that this conflict was not an adversarial encounter between comparable forces before an impartial and disinterested judge.⁹³ Rather, it was a conflict between the unaided individual and the power of the Crown and the unequalled resources it commanded. The prisoner was afforded only a minimal opportunity to

⁹⁰ 1 Stephen, 1883, pp.216, 221, 357-68; Kauper, 1931-2, pp.1232-34; 1 Holdsworth, 1956, p.296; 8 Wigmore, 1961, pp.327-29; Levy, 1968, pp.325-6; Veall, 1970, pp.17-20; Berger, 1980, p.101.

⁹¹ Veall, 1970, pp.21-22. See also Harding, 1973, pp.74-5.

⁹² Veall, 1970, p.20.

⁹³ Harding, 1966, pp.129-32.

challenge the case for the Crown at his trial once the prosecution process was engaged. Furthermore, there was no right of appeal to a higher court.

The inquisitorial procedures that obtained under the prerogative courts and the common law, revolved around and depended upon confessions which were crucial for the affirmation of actual or supposed guilt. The common law, therefore, in parallel with the prerogative courts, evolved interrogatory practices for the principal purpose of eliciting required confessions. The examination was, for that reason, the essence of the criminal justice process. It was, as Sir Francis Bacon argued in 1673,⁹⁴ the point at which justice enters into criminal causes.

Inquisition Under Attack

The movement that resulted in the unsuccessful Parliamentary assaults on inquisitorial procedures and in particular the *ex officio* oath in the mid-fourteenth century, was, by the end of the sixteenth century, increasingly supported by lawyers of the common law.⁹⁵ In this period the Courts of High Commission, Star Chamber and of the common law were working in closer collaboration with each other.⁹⁶ The mounting public disaffection with the jurisdictional excesses of the conciliar courts together with their procedures appears to have intensified as a result of the sixth commission of the Court of High Commission in 1583. This was led by Archbishop Whitgift, who was reputed to be "a man of stern Christian zeal, determined to crush heresy wherever its head was raised".⁹⁷ Similarly, the enmity engendered by the Court of Star Chamber seems to have increased during the reign of Charles I, under the formidable and pervasive influence of William Laud, Archbishop of Canterbury.⁹⁸ Increasingly the common law courts began to articulate their opposition to the procedures of their jurisdictional rivals by granting writs of prohibition.⁹⁹ These writs, often directed against the administration of the *ex officio* oath, frequently invoked the statute *Articuli Cleri* of 1315-16, which had attempted to restrain the ecclesiastical courts to matrimonial and testamentary causes.¹⁰⁰

By the beginning of the seventeenth century the maxim: *memo tenetur se ipsum produre* had emerged, as a product of the Puritan campaign against inquisitorial methods, to

⁹⁴ *Countess of Shrewsbury's Case* (1613) 2 Cobb.St.Tr. 770, p.778.

⁹⁵ Wigmore, 1902, pp.620-24; Morgan, 1949, pp.6-10; Ratushny, 1979, pp.168-74.

⁹⁶ Phillips, 1939, pp.123, 128-9; Levy, 1968, pp.270-71; Ratushny, 1979, p.170.

⁹⁷ Wigmore, 1902, p.620.

⁹⁸ Phillips, 1939, pp.121-27; Pittman, 1939, p.760; Levy, 1968, pp.267-73.

⁹⁹ Levy, 1968, pp.42, 220-8.

¹⁰⁰ 9 Edw.2 (1315-6). See Levy, 1968, pp.227-8; Ratushny, 1979, pp.168-9.

convey the principle that no one should be compelled to accuse themselves.¹⁰¹ The maxim was employed by common lawyers and religious non-conformists against their "substantial object of attack", the practice of subjecting suspects to inquisitorial-oath interrogatories, without first formally charging them with a specific offence.¹⁰² The opposition to inquisitorial procedures seems to have become pronounced when the common law courts began to recognise the insistent claims for the privilege against compulsory self-incrimination.¹⁰³ The precise source and meaning of the Latin maxim is obscure,¹⁰⁴ though in his assessment Morgan concludes:

All that can be safely asserted is that the common lawyers both in the second half of the 13th and all of the 14th century and under Henry VIII and Elizabeth resisted the inquisitorial procedure of the spiritual courts, whether Romish or English, and under Elizabeth began to base their opposition chiefly upon the principle that a person could not be compelled to furnish under oath answers to charges which had not been formally made and disclosed to him, except in causes testamentary and matrimonial. No doubt there was some confusion between the attack and the power of the spiritual courts even to entertain certain causes and its power to institute proceedings by the *ex-officio* oath. But there can equally be no doubt that to the common lawyers a system which required a person to furnish his own indictment from his own lips under oath was repugnant to the law of the land.¹⁰⁵

This statement indicates that the common lawyers objected to compelling individuals to answer examinations under oath and implies that were individuals to be examined after a formal accusation, and without the inquisitorial oath, this would comply with prevailing common law procedures. Supposing this construction to be so, there would appear to be an element of insincerity in the claim of the common lawyers since, at this time, their preliminary procedures did not meet this standard. Though the *ex officio* oath may not have been required at common law, individuals were examined in secret without first being duly accused.¹⁰⁶ This permits the conclusion that the objections of the common lawyers were not based upon the inquisitorial practices of the prerogative courts alone, but also to a great extent upon the jurisdictional incursions made by these courts into common law matters. It should also be noted that the attack said to have been mounted by the

¹⁰¹ Lowell, 1897-8, p.296; 9 Holdsworth, 1944, p.199; Ratushny, 1979, p.169.

¹⁰² Lowell, 1897-8, p.296; Morgan, 1949, p.8.

¹⁰³ Pittman, 1935, p.769; Moreland, 1956, p.272; Levy, 1968, p.220.

¹⁰⁴ Horowitz, 1958, pp.130-6; Ratushny, 1979, pp.169, 173.

¹⁰⁵ Morgan, 1949, p.9. Horowitz (1958, pp.131-8) however, suggests that the maxim *nemo tenetur prodere seipsum* was first translated into a firm common law doctrine by Lord Coke, when acting as counsel, in *Collier's Case* (1590) 4 Leo. 194. See also 9 Holdsworth, 1944, p.200.

¹⁰⁶ Lowell, 1897-8, p.294.

common lawyers, drew a large measure of support from Puritans and Separatists who were also hostile to the activities of the Court of High Commission, agent of the Established Church and the Crown.¹⁰⁷ That hostility also extended to embrace the Star Chamber and other courts practising inquisitorial methods.¹⁰⁸

The Trial of John Lilburn

The trial of the Puritan, John Lilburn,¹⁰⁹ beginning in 1637, focused the discontent of the non-conformists and the public at large upon the imposition of the inquisitorial oath. The trial precipitated the abolition of all courts employing the *ex officio* oath to coerce suspected persons to confess their supposed guilt.¹¹⁰ The opposition had, by the time of this trial, reached such proportions that Charles I was moved to write to the High Commission insisting on the continued validity of inquisitorial methods. The letter, dated February 4, 1637¹¹¹ required that those non-conformists who had "Withdrawn themselves from their obedience to our ecclesiastical law, into several ways of Separation, sects, schisms and heresies," and who had, "grown to that obstinacy - that some of them refuse to take their oaths, and others being sworn, refuse to answer -", should be compelled, "to answer upon their oath in causes against themselves". Such people, the letter continues, should be "enjoined to take their corporal oaths and by virtue thereof, to answer to such articles and interrogatories as shall be their objected against them". Where these people refuse to be so sworn or being sworn then refuse to answer, the letter obliged the Commission to declare them "'pro confesso' - held and had as confessed and convicted legally".

Lilburn had been remanded in prison by the Court of Star Chamber after having been charged with printing, and importing into England, heretical and seditious material. At his subsequent examination before the Attorney General, Lilburn was questioned upon his relationship with other suspects. When his examination turned to the nature of his acquaintance with Warton, the co-accused, Lilburn reports himself as objecting "... why do

¹⁰⁷ See Wigmore, 1902, pp.610-12; Horowitz, 1958, pp.136-8.

¹⁰⁸ Pittman, 1935, pp.769-70.

¹⁰⁹ *The Trial of John Lilburn and John Warton* (1637) 3 Cobb.St.Tr. 1315. This report, it should be noted, consists of Lilburn's own account of his trial, its objectivity therefore may be questioned. However, in providing a sketch of seventeenth century criminal justice practice, it remains valuable.

¹¹⁰ Wigmore, 1902, p.264; Pittman, 1935, p.770; Morgan, 1949, p.9; Levy, 1968, pp.271-2; Ratushny, 1979, p.171.

¹¹¹ "King Charles 1. Letters to the High Commission Court" (1637) Hazard, 1 State Papers, p.428. This letter is reproduced in Pittman, 1935, pp.770-1.

you ask me all these questions? these are beside the matter of any imprisonment; I pray come to the thing for which I am accused and imprisoned."¹¹² On being further pressed he replied:

... I am not imprisoned for knowing and talking with such and such men, but for sending over Books; and therefore I am not willing to answer you any more of these questions, because I see you go about by this to ensnare me for seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination: and therefore if you will not ask me about the thing laid to my charge, I shall answer no more.¹¹³

He also refused to submit to the *ex officio* oath and relates that:

... some of the clerks began to reason with me, and told me every one took that oath: and should I be wiser than all other men? I told them, it made no matter to me what other men do; but before I swear, I will know better grounds and reasons than other men's practice, to convince me of the lawfulness of such an oath, to swear I do not know to what.¹¹⁴

He was then examined as to the basis of his refusal. He maintained that he perceived "the oath to be an oath of inquiry ... and of the same nature as the High Commission Oath", which he considered unlawful. However, he also claimed that had he been proceeded against in accordance with common law due process principles he would have submitted to the oath.¹¹⁵

The court, which proceeded *pro confesso*¹¹⁶ found both Lilburn and Warton "guilty of a very high contempt" and condemned them to be fined, whipped and pilloried for their "presumptuous boldness in refusing to take a legal oath; without which many great and exorbitant offences, to the prejudice and danger of his majesty, his Kingdoms, and loving subjects, might go away undiscovered, and unpunished."¹¹⁷ The sentence of the Court was carried out in April, 1638. In November, 1640, Lilburn petitioned the House of Commons which, on May, 4, 1641, voted the sentence of the Star Chamber "illegal and against the liberty of the subject."¹¹⁸ He also petitioned the House of Lords. The Lords ordered the

¹¹² *Supra.*, n.109, p.1317.

¹¹³ *Ibid.*, p.1318.

¹¹⁴ *Ibid.*, p.1320.

¹¹⁵ *Ibid.*, p.1332.

¹¹⁶ See Phillips, 1939, p.114.

¹¹⁷ *Supra.*, n.109, p.1327.

¹¹⁸ *Ibid.*, p.1342.

sentence to be "totally vacated, obliterated and taken off the file in all courts ... as illegal."¹¹⁹ On December 21, 1648, Lilburn received £3000 in compensation.

In March, 1641, against a background of much public attention which accompanied Lilburn's case,¹²⁰ two bills were introduced to the Long Parliament to abolish the Courts of Star Chamber, High Commission and all courts exercising the like jurisdiction. The bills were passed into law in July of that year.¹²¹ The second of these statutory measures also prohibited any ecclesiastical tribunal or official from administering the *ex officio* oath for the purpose of obliging anyone charged "to confess or accuse himself or herself of any crime, offence, delinquency or misdemeanour", which may expose them, "to any censure, pain, penalty or punishment whatsoever."¹²²

Following the 1641 Acts a case was heard in December of that year where the privilege against compulsory self-incrimination was asserted and appears to have been judicially acknowledged. In the *Twelve Bishops' Trial*¹²³ the defendants, who had been charged with high treason by the House of Commons in its capacity as the "grand jury of the nation" and brought before the House of Lords, which sat as judge and jury, refused to answer on their oaths whether they had subscribed to a treasonable petition on the ground that they were not "bound to accuse themselves".¹²⁴ The 1641 Act prohibiting the inquisitorial oath, therefore, seems to have been construed restrictively as applying only to ecclesiastical courts and their officials. Thus, in 1662, it was necessary to further enact that "no one shall administer to any person whatsoever the oath usually called "ex officio", or any other oath, whereby such persons may be charged or compelled to confess any criminal matter."¹²⁵

Upon the mid-seventeenth century relinquishment of official torture;¹²⁶ the abolition of the prerogative courts, through which torture was most frequently administered; and with them the inquisitorial oath; the common law, its jurisdiction and its procedures - which formally eschewed the compulsory self-incriminatory oath - gained greater legitimacy.¹²⁷ Under the common law process issues were to be determined not by the oath of the accused but by the oaths of presenting and petit jurors who acted, Stephen suggests, as *ex*

¹¹⁹ *Ibid.*, p.1348.

¹²⁰ Wigmore, 1902, pp.625-6.

¹²¹ 16 Car.1, c.10 and c.11 (1641).

¹²² 16 Car.1, c.11, s.4(2).

¹²³ *Twelve Bishops' Trial* (1641) 4 Cobb.St.Tr. 63.

¹²⁴ *Ibid.*, p.76; see also Wigmore, 1902, p.633; Levy, 1968, pp.284-5.

¹²⁵ 13 Car.2, c.12 (1662); see Wigmore, 1892, p.82.

¹²⁶ See Jardine, 1837, pp.16, 45, 68-70; and Langbein, 1977, pp.134-9, who agree that the last recorded torture warrant was issued in 1640. However, the unofficial use of torture may have continued beyond this date. Certainly there is evidence to suggest that the threat of torture was used to coerce confessions for some time after 1640. See, for example, *Tonge's Case* (1662) 6 How.St.Tr. 225, p.259.

¹²⁷ Wigmore, 1902, p.619; Horowitz, 1958, pp.123-4.

officio witnesses.¹²⁸ The oath of the accused, Wigmore argued, was considered unnecessary since it afforded the prisoner "a peremptory method of self exoneration."¹²⁹ That common law defendants were not obliged to take the *ex officio* oath, therefore, relates to the decisive nature in which the oath was regarded in the forms of trial that antedated the petit jury mode of trial.¹³⁰ However, the common law preliminary and trial procedures were such that suspected and accused persons continued to be compelled to answer self-incriminatory questions, without the operation of the *ex officio* oath.¹³¹

Barnes argues that the "triumph of the common law" in the seventeenth century, coupled with the Glorious Revolution of 1688, "substantially dismantled the vigorous, inquisitive, interfering government of the Tudor and early Stuart monarchs."¹³² This had a decisive impact upon common law criminal procedures. Beginning from about this period, until the late nineteenth century, persons indicted for crime were gradually rendered incompetent and non-compellable to testify under oath as witnesses at their trial. The defendant was, however, entitled to elect to speak on his own behalf, unsworn. This development seems to have occurred as a direct consequence of the abolition of the prerogative courts and with them the inquisitorial oath.¹³³ Nevertheless, in spite of the official repudiation of the compulsory oath associated with the abolished prerogative courts, the practice of subjecting defendants - who were obliged to conduct their own defence - to searching interrogatories at their common law trial persisted through to the early eighteenth century.¹³⁴ Indeed, in the absence of a sophisticated corpus of evidential rules within the common law, a defendant could still be convicted on the basis of the impression the petit jury derived from his bearing under stringent judicial examination.¹³⁵ However, this practice appears to have been so closely associated in the public mind with the inquisitorial procedures of the prerogative courts that pressing judicial interrogatories of defendants gradually died out. The development of rules of evidence, from the eighteenth century, underscored this movement and transformed it into a practice which, as a matter of common law, rather than any statutory measure, prohibited the judicial interrogation of defendants at their trial.¹³⁶

¹²⁸ Stephen, 1877, p.748.

¹²⁹ Wigmore, 1902, p.628.

¹³⁰ See Levy, 1968, p.324.

¹³¹ Wigmore, 1902, pp.627-9; Ratushny, 1979, p.171.

¹³² Barnes, 1977, p.322; see also 4 Holdsworth, 1945, p.70; 5 Holdsworth, 1945, p.433.

¹³³ Morgan, 1949, p.12; Levy, 1968, pp.322-5.

¹³⁴ Wigmore, 1902, p.635; Levy, 1968, p.263. Stephen, however, suggests the practice of pressing defendants with interrogatories "died out soon after the Revolution of 1688". (1 Stephen, 1883, p.440.)

¹³⁵ 1 Stephen, 1883, pp.336-7.

¹³⁶ Stephen, 1877, pp.749-52; see also Pittman, 1968, p.774.

The popular disaffection with judicial coercion was not limited to the inquisitorial procedures of the prerogative courts. Veall provides evidence indicating that numerous manifestos and pamphlets of the period denounced both the prerogative and the common law courts as legacies of Norman law, weapons of oppression and antithetical to individual freedoms.¹³⁷ In one of the examples cited by Veall, a pamphlet published in 1659, the author inveighs against the common law as being "founded on the principles of tyranny, fallacy and oppression for the benefit of those that made them."¹³⁸ The demands for greater respect for the lives and liberties of subjects, for freedom from arbitrary arrest detention and imprisonment, for freedom against compulsory self-incrimination and for due process trial was, therefore, aimed as much at common law procedures as those employed by the infamous prerogative courts.¹³⁹ The sentiment that had reflected a vigorous opposition to the inquisitional oath, the use of torture and to the courts that relied upon such inquisitorial methods appear to have brought about the gradual elimination of coercive judicial questioning at common law trial. By the early part of the eighteenth century, defendants had, acquired the "right" to remain silent at their trial.

Nevertheless, inquisitorial interrogations persisted at a location which remained immune from the reforms instituted at the public trial phase of the common law criminal process. Statutes passed in the middle of the sixteenth century continued to govern the crucial preliminary examination of suspects until their abrogation in the middle of the nineteenth century.¹⁴⁰ These statutes authorised justices of the peace to "examine" suspected felons. Under the pre-trial interrogation sanctioned by these statutes, the privilege of a defendant to remain silent at his trial was effectively undermined. The purpose of the preliminary examination was to extort from the suspect, held *incommunicado*, a confession of guilt or enough self-incriminatory evidence to ensure a successful prosecution. While the *ex officio* oath was not normally employed, the justices, who acted as investigators as well as prosecutors, might employ coercive methods to extort admissions. Admissions thus elicited would be tendered in evidence against the accused at his trial.¹⁴¹ These pre-trial procedures had the effect of countering developments made at the trial stage of criminal proceedings. Indeed, they operated to increase the social and crime control efficiency of criminal procedure.¹⁴² The background to the role assigned to justices of the peace in the evolving structures of social and crime control and the management of procedures

¹³⁷ Veall, 1970, pp.75, 101-2, 108, 152.

¹³⁸ William Cole, 1659, *A rod for the Lawyers*, reproduced in Veall, 1970, pp.102-3.

¹³⁹ See Wigmore, 1902, p.619.

¹⁴⁰ The statutes: 1 & 2 Phil. and Mar. c.13 (1554); 2 & 3 Phil. and Mar. c.10 (1555), and their import are discussed in chapter 3.

¹⁴¹ Wigmore, 1902, p.628; Levy, 1968, p.325; Berger, 1980, p.101.

¹⁴² Horowitz, 1958, pp.129-30; Levy, 1968, p.35.

designed to furnish the courts with confession evidence are subjects discussed in the following chapter.

3

THE HISTORICAL MANAGEMENT OF PRELIMINARY PROCEDURES

Introduction

The Norman-imposed machinery of criminal justice obliged the local community to apprehend and present for trial all suspects the neighbourhood, as represented by the jury of presentment, accused of crime.¹ In the absence of an official and organised law enforcement agency charged to make arrests and to investigate crime, the local community was placed under a duty to apprehend suspects.² When a hue and cry was raised, under the direction of the local sheriff or constable, the wider community was made liable to the Crown if it, or its members, did not participate in the pursuit of suspects. Generally, malefactors apprehended *flagrante delicto* were immediately executed following the summary judgement of the offended community.³ In the performance of such arrangements the early criminal law did not contemplate official preliminary examinations of suspected or accused persons.⁴ The community at large was charged to apprehend suspects and the presenting jury, it was assumed, was sufficiently well informed, being neighbours of the accused, to duly indict suspects for trial. However, with the emergence and establishment of the petit jury mode of trial, an effective official means of supervising the arrest, detention and presentment of accused persons became vital to the capacity of the prosecution process to generate evidence capable of facilitating secure convictions. Accordingly, it became necessary to supplement the information upon which the largely self-informed jury could base its decisions.

With the gradual erosion of feudalistic social structures, jurors gradually became less reliant upon their own inherent knowledge of suspected individuals. An official element was, therefore, required to ensure the presenting jury indicted and the petit jury convicted accused persons. The collapse of the self-informing jury, therefore, fostered the need for a process of official evidence-gathering. Increasingly juries were to be persuaded of the correctness of their decisions to indict and to convict on the basis of the evidence presented before them, rather than on their personal impressions of their accused

¹ Baker, 1977, p.15.

² Harding, 1966, pp.26-7.

³ 1 Stephen, 1883, pp.189-90; Maitland, 1885, pp.118-23; Beard, 1904, pp.37-8; 1 Holdsworth, 1956, pp.294-6; Harding, 1966, pp.21-22, 55.

⁴ 1 Stephen, 1883, p.216; 4 Holdsworth, 1945, p.258; 1 Holdsworth, 1956, p.295.

neighbour. The office of justice of the peace, staffed by the local gentry, evolved to perform this vital evidence-gathering function. Through this office the Crown created an official agent with authority to manage the operation of the preliminary phase of the criminal justice process.

A key feature in the evolution of English criminal procedures, therefore, was the gradual contraction of jury members reliant upon their own first-hand knowledge of the issues upon which they were to indict and convict. The preservation of the peace occasioned and justified the progressive displacement of community-based responsibility for arrest, accusation and prosecution.⁵ Under the justices, the community-based prosecution process was reconstructed to permit the officially sanctioned modes for procuring testimony from witnesses and confession evidence from suspects to prevail.

Over time, the Crown vested the justices with powers with which to summarily convict and punish suspected wrongdoers. Elevated into the status of "intermediate judges",⁶ justices also acquired control over preliminary examinations and, thereby, governed the flow to the courts of evidence indicative of guilt, particularly confession evidence as irrefutable proof of guilt. It was, therefore, at the crucial pre-trial stage of the criminal process that inquisitorial interrogatories, associated with the practices of the prerogative courts, were received by the common law.⁷

The Early Justices

The origin of the office of justice of the peace has been traced to its twelfth century ancestors, Knights appointed to perform local administrative, military and policing functions attendant to their general duty to keep the King's peace.⁸ As part of the extension of royal power through the progressively centralised legal system, an Act of 1237⁹ required good and lawful Knights of each county to be "assigned to keep the peace". By the mid-thirteenth century, such functions as making arrests, and the hearing of inquests, came to be regularly invested in the office of the Keeper.¹⁰ In 1285 the Statute of

⁵ 4 Holdsworth, 1945, p.528; Devlin, 1960, pp.3-11; Baker, 1977, pp.16-17.

⁶ 1 Stephen, 1883, p.233; see also Devlin, 1960, pp.3-5.

⁷ Beard, 1904, pp.55-8; 4 Holdsworth, 1945, p.528; Levy, 1968, p.35; Walker, 1976, p.15.

⁸ Beard, 1904, pp.17-28; Kiralfy, 1962, p.227; Bellamy, 1973, pp.94-5; Walker, 1976, p.15.

⁹ 1 Edw.3, c.16 (1237). See Beard, 1904, pp.35-44.

¹⁰ 1 Stephen, 1883, p.112; Beard, 1904, pp.28-32; Moir, 1969, p.16; Powell, 1989, p.15.

Westminster provided for the presentment of breaches of the King's peace to be made before these custodians of the peace.¹¹ In the mid-fourteenth century an attempt was made to restrict the quasi-judicial authority enjoyed by the keepers and to subordinate their duties more directly to the jurisdiction of centrally commissioned circuit justices. The House of Commons, in which the interests of the local gentry were championed, resisted these efforts and, under Edward III, secured for the keepers powers to hear and determine petty offences.¹² It was also through their representatives in the Commons that the keepers succeeded in acquiring responsibility for administering the economic legislation passed in response to the ravages wrought by the Black Death of 1349 which had depleted the work force. This, combined with the Peasants' Revolt of 1381, created "special and urgent reasons for social control."¹³ The Crown responded by augmenting the responsibilities of the justices to include the acceptance of presentments and the power to do justice summarily - that is in the absence of a trial jury - in respect of lesser offences known as trespasses against the peace, or later as misdemeanours.¹⁴

The title "justice of the peace" appeared in statute for the first time in 1360-61 and may have derived from common parlance descriptions of the office.¹⁵ By this statute justices were required to "take and arrest all those that they may find by Indictment, or by Suspicion, and put them in Prison; and to take of all them that be of good Fame where they shall be found sufficient Surety and Mainprise of their good behaviour towards the King and his people, and the other duly to punish". Beyond its legitimation of coercion, the enactment seems to have been the first to give statutory authority to the practice of justices granting bail in limited cases. "When the administration of justice was in its infancy", remarked Stephen, "arrest meant imprisonment without inquiry till ... the arrival of [itinerant] justices, which might be delayed for years, and it was therefore a matter of utmost importance to be able to obtain a provisional release from custody".¹⁶ The accretion of such powers enabled the justices to emerge, from the late fourteenth century,

¹¹ 13 Edw.1, c.6 (1285)

¹² Beard, 1904, pp.42-4; Harding, 1966, p.71; Moir, 1969, pp.17-9; Powell, 1989, pp.15-20.

¹³ Allen, 1953, pp.132, 136; see also Beard, 1904, pp.49, 59-60; Harding, 1966, pp.71-2; Moir, 1969, p.18; Skyrine, 1979, p.2.

¹⁴ Lee, 1901, pp.44-6; Beard, 1904, pp.47, 55-7; Moir, 1969, p.19; Bellamy, 1973, pp.89-98; Walker, 1976, p.10.

¹⁵ 34 Edw.3, c.1 (1360-61). See Beard, 1904, pp.38-42; Kiralfy, 1962, p.228; Harding, 1966, p.71; Langbein, 1974, p.5.

¹⁶ 1 Stephen, 1883, p.233; see also Langbein, 1974, p.6.

supreme among the local representatives of Crown authority in the administration of common law preliminary procedures.¹⁷ Beard argues, the desire of the Crown to extend and consolidate its central power obliged it to promote the royal office of justice of the peace since: "Only by concentrating power in the hands of the strong middle class gentry independent of the great lords, could the Crown hope to crush the turbulent elements in the Kingdom."¹⁸ Indeed, in its development of the office, the Crown had created a "convenient and effective" agent for extending to the localities its social and crime control policies.¹⁹

Examining Justices

The statutory source of the power of justices to examine suspects and of summary trial has been ascribed to the labour legislation of the mid-fourteenth century.²⁰ A statute of 1351 required labourers, by their oaths, to conform to fixed rates of pay. Those who were suspected of receiving more than the fixed rate were to be reported by bailiffs or constables and summoned to answer before justices who were authorised to fine or imprison suspected offenders until they gave sureties to observe the employment regulations.²¹ It appears that suspects were to be examined by the justices as a means of providing supplementary information upon which the presenting jury was to frame its indictment. It was not, therefore, designed as an alternative to jury of presentment indictments.²²

The 1351 statute represents an early illustration of the primacy of crime control considerations over those of due process.²³ The accusatory procedure, which was grounded on the initiative of the local community and systematised in the twelfth century by the Assizes of Clarendon and Northampton, was relegated by the infusion of official actors instructed to enforce the employment regulations. The introduction of an official element

¹⁷ Moir, 1969, p.19; Langbein, 1974, p.66.

¹⁸ Beard, 1904, p.40.

¹⁹ *Ibid.*, p.19. See also 4 Holdsworth, pp.529-30.

²⁰ Beard, 1904, pp.32-5, 58-64; Allen, 1953, p.136; Walker, 1976, p.11; Bellamy, 1984, pp.8-9.

²¹ 23 Edw.3, cc.1-7 (1351)

²² Bellamy, 1984, p.9.

²³ *Ibid.*

into the underlying community-based prosecution process meant that convictions were no longer wholly dependent upon the due process requirement that the community suspected, presented and indicted individuals on the basis of its collective knowledge of the issues. Under its provisions this statute supplemented this arrangement by authorising Crown officials to initiate proceedings on the basis of their own suspicions.

The increasingly transient populace of the formerly fixed hierarchical structure of feudal society may have been instrumental in the decay of the community-based system of denunciation. However, it has been suggested that at this early stage in its development, the jury of presentment was regarded by the Crown and governing classes with some degree of distrust. "It was probably felt", Bellamy argues, "that out of sympathy with the would-be employee [members of the local community] might refuse to report offences".²⁴ The breakdown of the system of prosecutions founded upon neighbours exhorted to inform agents of the Crown of trespasses against its peace, coupled with the dominating social and crime control interests of the powerful, appears then to have been at the root of "the birth of summary justice of an every day nature under the common law."²⁵ In other words, early conceptions of local justice which had assumed an identity of interest between the rulers and the ruled began to collapse as the rulers lost confidence in the ruled. This created the need for new forms of social and crime control.

Such considerations emerge as key themes pervading the early statutes empowering justices to examine suspects and to deliver summary justice. Initially restricted to minor offences, or trespasses, the progressive infusion of an official dimension into the prosecution process ensured that the repression of conduct stigmatised as criminal was not impeded either by a reluctance on the part of individuals to institute proceedings, or by the perceived shortcomings of the presentment jury.

In 1383, the Crown again sanctioned the examination of suspects as an investigative technique under the justices.²⁶ This statute enjoined justices to take sureties for good behaviour from vagabonds, or to imprison them until the next gaol delivery where they failed to find the required sureties. The justices were authorised to conduct their inquiries either on the basis of information received from the presenting jury or by their own examination of the suspect.²⁷ It is not clear whether the evidence elicited from the examination before justices was intended to furnish the presenting jury with ancillary

²⁴ Bellamy, 1984, p.9; see also Beard, 1904, pp.101-2.

²⁵ Bellamy, 1984, p.9.

²⁶ 7 Rich.2, c.5 (1383).

²⁷ See Langbein, 1974, p.68; Bellamy, 1984, p.10.

information with which to indict the suspect, or whether the evidence was used as an alternative to the indictment of the presenting jury. It may be assumed that this would depend on the extent to which such examinations yielded confessions of guilt capable of rendering the traditional inquiry before the presenting jury unnecessary and, therefore, to enable a prosecution to proceed to conviction.

Although the statute preserved the investigative and prosecutorial functions of the presenting jury, the interests of crime control, with its attendant pecuniary benefits for the Crown, required those functions be supplemented by an official examination. Bellamy suggests that the recourse to the examination procedure, in this instance, resulted from the recognition that suspects were often unknown to the community in which they were apprehended and thus, unknown to the members of the presenting jury.²⁸ The degeneration of the rigid structures of feudal society may have necessitated this deviation from the process of due accusation required by the Assizes of Clarendon and Northampton, however, social and crime control considerations also informed the extension throughout the following centuries of the power of justices to proceed by examination to summary conviction in respect of a growing number of misdemeanours. The inability of the Crown to initiate criminal proceedings was thereby tempered by the activities of its intermediary who was authorised to arrest individuals on the basis of his own suspicions, rather than on the accusation of neighbours; to test those suspicions under examination; and to institute prosecutions.

The crime control agenda of the Crown is also evidenced in its facilitation of convictions in the event that its officers witnessed an offence against its peace. In such circumstances the justice of the peace was required to certify the details of the incident. The certificate had the force of a jury of presentment indictment. Those accused in this manner could be required to answer *ex officio* oath interrogatories before the Star Chamber or one of its associated tribunals.²⁹ The effect of such procedures and, in particular, the empowerment of the justices was to gradually shift from the community responsibility for investigating and prosecuting offenders and to vest those responsibilities in Crown officials.

In 1414 the justices were authorised to examine suspects to discover whether any servant was receiving, and any master giving, excessive wages.³⁰ The examination was to be conducted upon the oath of the suspect, who, upon his confession, was to be punished as

²⁸ Bellamy, 1984, p.10.

²⁹ Harding, 1966, pp.77-8; Bellamy, 1984, pp.10-11.

³⁰ 2 Hen.5, c.4 (1414).

though he had been convicted by jury trial.³¹ This appears to be the first and only statute to require justices to compel suspects to answer interrogatories under oath.³² However, in legitimating procedures designed to procure confessions and in circumventing the indictment of the presenting jury,³³ the statute also demonstrates that, since the coerced confessions were admitted at trial, the common law had no hesitation in resorting to the very methods it would later denounce as being "repugnant to the law of the land" where the imperatives of crime control demanded them.³⁴

In his discussion of this enactment Bellamy suggests that in the event that a confession was not extracted, the traditional presentment procedure would be activated.³⁵ However, under *ex officio* oath examination, confessions of guilt or other incriminatory admissions would seem probable. Furthermore, in the event that a full confession was not forthcoming, justices may well have been reluctant to invoke the presentment procedure which Bellamy himself acknowledges was regarded with uncertainty by those most interested in securing convictions.³⁶ Were the "normal" common law process of presentment and trial to be engaged, however, incriminatory evidence elicited from the examination may have been adduced for the Crown against the defendant. A practice that was to become increasingly common.³⁷

The Statute of 1414 was supplemented by one of the similar nature. This empowered justices to summarily confine to gaol, for a period of one month, suspects considered by the justices to be guilty, irrespective of whether a confession of guilt was elicited under examination.³⁸ Enacted to suppress excessive wage demands, the provisions of this statute mark the further extension of powers of examination and summary conviction under the justices, displacing the juries of a presentment and of trial. From this period such powers began to appear in numerous enactments aimed at an increasing array of minor offences.³⁹

³¹ Langbein, 1974, p.68; on the complaints made regarding the corruption of presenting jurors see Bellamy, 1984, p.101-2.

³² Langbein, 1974, p.68.

³³ See Langbein, 1974, p.68; Bellamy, 1984, p.12.

³⁴ Jardine, 1837, p.6; Morgan, 1949, p.9; Baker, 1986, p.267.

³⁵ Bellamy, 1984, pp.9, 11-12.

³⁶ Bellamy, 1984, p.9; see also Beard, 1904, pp.101-2.

³⁷ Langbein, 1974, pp.118-125.

³⁸ 2 Hen.6, c.18; see Bellamy, 1984, pp.12-13.

³⁹ Beard, 1904, pp.58-71; Langbein, 1974, pp.68-9; Bellamy, 1984, pp.13-15.

In one example, justices were authorised to avoid awaiting presentments, to regard suspects they examined as having been duly indicted and to fine those they determined were guilty.⁴⁰

The growth in the employment of examination and summary trial, with its concomitant marginalisation of the features associated with due process, namely, the common law procedures of presentment and trial by jury, is of itself an articulation of the dominant social and crime control values of the Crown. Under Henry VII the examination and summary conviction competence of justices was again extended.⁴¹ Bellamy has located no less than ten statutes from this reign commanding the employment of these "truncated procedures"⁴² and a similar number from the reign of Henry VIII.⁴³

The examination procedure authorised by a statute of 1485 is illuminating.⁴⁴ It targets those suspected of unlawful hunting. However, it also introduced what appears to be a novel form of coercion in its effort to secure confessions and, thereby, convictions. It directs justices to examine the suspect in the manner of the preceding statutes, however, it also provides that "if he then confesse the trouthe & all that he shallbe examyned of and knoweth in that behalf" then he shall be convicted, on the basis of that confession, of a trespass or misdemeanour. The incentive for the accused to so confess, nevertheless, lies in the direction that "if the same persone wilfully concele the said huntyngs or any persone with hym defective therein, that the same concelement be ... Felonye, and the same felonye to be enquired of and determyned as othir felonyes within this Realme have used to be."⁴⁵ Thus, should the accused attempt to contradict the presumption of guilt inherent within the provisions of the statute he would be tried at the subsequent judicial hearing of a felony and not of a misdemeanour. Where the preliminary examination before the justice of the peace failed to secure a full confession, any incriminatory material that emerged would be adduced by the examining justice at the trial of the accused felon.⁴⁶ The examining justice also had an incentive to extort a confession during his examination of the suspect. A rigorous interrogation would at best provide a confession and save him the inconvenience

⁴⁰ 8 Hen. 6, c.4 (1429); see Langbein, 1974, pp.68-9; Bellamy, 1984, pp.14-15.

⁴¹ Langbein, 1974, pp.69-75; Bellamy, 1984, p.15.

⁴² Bellamy, 1984, pp.15-19.

⁴³ *Ibid.*, pp.19-22.

⁴⁴ 1 Hen.7, c.7 (1485). See Langbein, 1974, p.70.

⁴⁵ *Ibid.*

⁴⁶ Langbein, 1974, p.71.

of testifying at the trial. Alternatively, if a confession was not forthcoming incriminating admissions might follow firm questioning, to furnish the trial with evidence sufficient for conviction.

The frequent recourse to summary trial conducted by examination accompanied the increasing utilization of such methods within the procedures of the prerogative courts of the Tudor period which administered summary justice "without any pretence of a jury trial."⁴⁷ Indeed, the practices that prevailed at the preliminary phase of the common law criminal process worked in conjunction with the procedures of the prerogative courts and, to a large extent, shared their *modus operandi*; each employing inquisitorial methods geared to the procurement of confessions.⁴⁸ These methods were essentially sympathetic to the interests of crime control and antagonistic to both the interests of the individual and to the formal due process requirements of the common law.

The social and crime control oriented legislation of the Tudor period, which rested upon inquisitorial powers of examination and of summary conviction, was of itself a product of prevailing social and economic developments. The Wars of the Roses had had a disintegrating effect upon centralised government.⁴⁹ The Reformation had transferred many ecclesiastical concerns to the state and its organs of local government. The problem of discharged soldiers and wandering vagrants had become a matter of acute concern. This problem was compounded by the onset and rapid development of the enclosure movement. The increasingly mobile and largely unpoliced population perturbed the ruling classes. These considerations, Beard observes, necessitated "a complete system of state control."⁵⁰ Beard stresses that the "landed and commercial middle classes were anxious for internal order and willing to pay almost any price for it."⁵¹ The consequent policing legislation expanded the criminal law and employed the justices of the peace to enforce it. Tudor government, through the King's Council, and locally-based justices, ensured criminalised activities were "discovered and checked in their incipiency."⁵² The King's Council supervised the judicial and administrative duties of the justices. The Crown was, therefore, able to keep "a firm grasp upon the whole system of local government and to maintain a

⁴⁷ Beard, 1904, p.117.

⁴⁸ Beard, 1904, pp.114-17; Morgan, 1947, p.6; Langbein, 1974, pp.71, 73-4, 80; Bellamy, 1984, pp.30-1.

⁴⁹ Veall, 1970, pp.1-10. See also Harding, 1966, p.72.

⁵⁰ Beard, 1904, p.72; see also pp.85-93, 98-100; Bellamy, 1973, p.102.

⁵¹ Beard, 1904, p.74.

⁵² Beard, 1904, p.73. See also 4 Holdsworth, 1945, pp.529-30; Harding, 1966, pp.86-7.

penetrating and constant surveillance over the whole Kingdom."⁵³ The Council, on behalf of the Crown, appointed the justices from the ranks of the most loyal and stable elements of the local gentry. Such individuals satisfied "the requirements of the central autocracy" since they were seen as possessing sufficient knowledge of local conditions and persons to facilitate the efficient administration in the localities of central government policies.⁵⁴ The justices of the peace together with their stringent powers of social control also carried the support of the landed and commercial middle classes. In an age of unprecedented social commercial and industrial transformation their demands for the rigorous suppression of domestic disorder were acknowledged in the crime control legislation which emanated from the centre and was enforced in the localities by the justices. Selected from the ranks of the gentry these Crown emissaries could, as justices of the peace, put down the riots of their labourers and, as members of Parliament pass the statutes empowering them to do so.⁵⁵

By a series of thirty or so enactments, therefore, dating from the mid-fourteenth to the mid-sixteenth centuries, the justice of the peace had acquired authority to issue warrants of arrest; to examine suspects; to bail, or take recognizances from, suspects; to summarily convict in minor offences; and had almost complete charge of the preliminary phase of the machinery of criminal prosecutions.⁵⁶ Under these measures justices did not, however, enjoy powers to convict or discharge persons suspected of felony. Here, petit jury trial was preserved. Thus, in "serious cases" justices could only conditionally release the suspect on bail or imprison him until the next gaol delivery.⁵⁷ The use of examination and summary conviction procedures at common law, displacing the juries of presentment and of trial in cases of misdemeanour was prompted, argues Bellamy, by a perceived failure of grand juries to indict persons suspected of involvement in crime.⁵⁸ This assessment accords with that made earlier by Beard who found: "Complaints were continually made about the difficulty of securing impartial verdicts from jurors on account of their fear or favouritism."⁵⁹ Such complaints guided the passing of statutes explicitly devised to

⁵³ Beard, 1904, p.118; see also Harding, 1966, p.144.

⁵⁴ Beard, 1904, pp.70-71; see also Harding, 1966, pp.72-3.

⁵⁵ Harding, 1966, pp.244, 269; see also Beard, 1904, pp.59, 61-4; Kauper, 1932, p.1233.

⁵⁶ 4 Holdsworth, 1945, p.173; Langbein, 1973, p.319; 1974, pp.63-6.

⁵⁷ Langbein, 1974, p.7.

⁵⁸ Bellamy, 1973, pp.158-61; 1984, p.5.

⁵⁹ Beard, 1904, p.101.

confront the problem. For example, in 1495 a statute⁶⁰ recites that owing to the corruption of jurors, it had been impossible in many cases to obtain indictments from juries of inquest. The statute provided that justices of the peace, upon information made before them for the King, be authorised to hear and determine, without indictment from juries, offences and contempts committed by any person, saving treason, murder and felony.

Further evidence indicative both of the ascendancy of crime control values and of the dissatisfaction of the Crown with the traditional prosecution procedures manifested itself in the growth of statutory *qui tam* actions. Under this method of initiating criminal proceedings, the informer was encouraged to prosecute an individual he accused both on his own behalf and that of the Crown. His information, given on oath, would serve in place of an indictment. Upon a successful prosecution and conviction the informer would be entitled to receive half of the goods and chattels of the convicted person.⁶¹ Measures such as these may also have been a response to the increasingly mobile population which was expanding at an unaccustomed rate bringing with it the gradual disintegration of Medieval self-informing juries which were being transformed into passive court-room triers largely ignorant of the facts at issue. The process which operated to denude jurors of their character as witnesses who, based on their own first-hand knowledge, could be expected to accuse and convict suspects, was complete by the beginning of the sixteenth century. From about this time jurors were required to act only upon the evidence laid before them by officers of the Crown.⁶²

It was the justices of the peace who performed the vital evidence-gathering function fostered by the gradual metamorphosis of the jury. The legislation authorising summary trial by examination was an attempt to confront the declining confidence in the competence of jurors. This enabled the Crown, through its agents to circumvent both the jury of presentment and of trial and to legitimate this departure from traditional due process prosecutorial practices, where necessary, by means of extorted confessions. It also allowed the Crown, by way of its officers, to supervise the construction of cases against individuals and the collation of incriminatory evidence upon which a conviction could be founded.

⁶⁰ 11 Hen.6, c.3 (1495).

⁶¹ Langbein, 1974, p.44; Baker, 1984, p.14; Bellamy, 1984, p.14.

⁶² Thayer, 1898, pp.90-136; Beard, 1904, p.19; 4 Holdsworth, 1945, pp.529-30; Devlin, 1956, pp.4-10; Levy, 1968, p.35; Langbein, 1973, pp.314-15; 1974, pp.118-25.

The Marian Statutes

Until the middle of the sixteenth century the examination and summary trial statutes were largely concerned with lesser offences. For cases of serious crime the presentment, indictment and trial by jury procedure was preserved. Langbein suggests this prevented the further extension of summary procedures. However, he also states that "the clumsiness of jury proceedings as a system of detection and denunciation was perpetually felt."⁶³ During the brief reign of Mary, a major step was taken to address the perceived weaknesses of the community-based process for the detection, presentment and trial of serious cases. Two statutes, of fundamental structural importance, remodelled common law preliminary proceedings and further elevated the justice of the peace as the central figure in the management of pre-trial criminal procedures geared to eliciting and to utilising confessions. Drawing on the examination procedures of their statutory forebears, these enactments of 1554⁶⁴ and 1555⁶⁵ effectively rationalised and formalised preliminary procedures behind an underlying rationale that accorded primacy to the values of crime control. They represent the culmination of a trend which progressively interposed an official prosecutorial dimension into a system that retained its formal reliance upon the due process requisites of presentment, indictment and trial by jury in cases of serious crime.

The 1554 "bail statute" was enacted to regulate the bailment powers of justices in respect of suspected felons. To combat the problem of improper or collusive bailing of suspects, in which single justices would sign each others bailments, the statute prescribed that at least two justices - one of whom was to be of the *quorum* and therefore "skilled in the law" - act simultaneously in the granting of bail.⁶⁶ It also required the justices to make a written record of the evidence against the accused. This account was to be scrutinized by the trial court to thereby bring the propriety of the bailment practices of justices under judicial supervision.⁶⁷ The judges were empowered by the statute to fine those justices who had

⁶³ Langbein, 1974, p.75.

⁶⁴ 1 & 2 Phil. and Mar. c.13 (1554).

⁶⁵ 2 & 3 Phil. and Mar. c.10 (1555).

⁶⁶ See the judgment of Grose, J in *Lambe* (1791) 2 Leach. 552, pp.555-57. See also 1 Stephen, 1883, pp.219, 236-38.

⁶⁷ Langbein, 1973, p.320; 1974, pp.8-10.

breached its provisions.⁶⁸ This gave the Crown effective control over the duties of its justices of the peace.⁶⁹

Langbein argues that the documentary account of the examination and resulting evidence against the bailed suspect was intended only to provide the supervising judges with a means of evaluating the propriety of bailments and not to supply the prosecution with information upon which to structure its case.⁷⁰ The apparent absence of similar procedures applicable to suspects denied bail would seem to support this view. However, should a conditionally released suspect honour his obligation to appear for trial, the documentation relating to his examination would, presumably, have been available to the court as a source of evidence against the accused.

Holdsworth confirms that the provisions of the 1554 Act "applied only when the prisoner was bailed", suggesting that the chief object of the statute was to rationalise bailment procedures. He goes on to argue that it was soon recognised "that some preliminary examination was quite useful when the prisoner was committed on a charge of manslaughter or felony as when he was bailed."⁷¹ The Marian "committal statute" of 1555, therefore, extended the procedures of the bail statute to incorporate cases in which bail had been denied to those suspected of felony and prescribed:

... from henceforth such Justices or Justice before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall [be] put in writing, within two days after the said examination, and the same shall certify in such manner and form and at such time as they should and ought to do if such Prisoner so committed or sent to Ward had been bailed or let to Mainprise, upon such pain as in the [1554] Act....⁷²

The Act not only required examining justices to provide a written account of their interrogation of those suspected or accused and their accusers for the trial court, they were

⁶⁸ 4 Holdsworth, 1945, pp.527-28.

⁶⁹ Beard, 1904, p.77. The Act appears to have been a second attempt to exercise stricter control over the bailment practices of the justices. The first, 3 Hen.7, c.3 (1487), seems to have proved ineffectual. See 4 Holdsworth, 1945, p.527.

⁷⁰ Langbein, 1974, p.11.

⁷¹ *Ibid.*

⁷² *Supra.*, n.65.

also authorised to "bind all such by Recognizance or Obligation, as do declare anything material to prove the said Manslaughter or Felony, against such prisoner as shall be so committed to ward, to appear at the next general Gaol Delivery ... to give evidence against the party." The taking of recognizances also had to be certified in the manner of the bail statute to ensure that the binding over of witnesses was similarly subject to judicial supervision.

By its measures, the committal statute formerly instructed justices of the peace to manage the collection of evidence *against* the accused and hence *for* the prosecution. Fashioned to secure and exploit confessions this statute established a regime in which, as Beattie remarked, "[a]ll suspects were to go on to trial, and the magistrates' task was to ensure that they got there and that the strongest evidence of their guilt would be contained in the depositions and examination that they were required to send in to the court."⁷³

The bail and committal statutes were largely codificatory measures which "regularised and reinforced" the developed pattern of prosecution.⁷⁴ However, the progressive imposition of an official agent meant that the prosecutorial discretion of private prosecutors was transformed into an obligation by the power of justices to take recognizances, effectively compelling potential prosecutors, on pain of forfeiting their bonds, to participate in the prosecution process.⁷⁵ In this respect it is noteworthy that the committal statute directs that only those who could "declare anything material ... against" the suspect or accused, were to be so compelled.

While the criminal process retained some reliance on the initiative of the private victim-prosecutors, the committal statute, in its elevation of justices represents a "decisive step in the crystallization of the public prosecutorial function for cases of serious crime."⁷⁶ Under its provisions it charged the justice of the peace to "assemble a prosecuting brief that would stiffen and supplement the case presented orally by the victim-prosecutor in court."⁷⁷ However, in the absence of surviving aggrieved or interested citizens who could be compelled to prosecute, or in circumstances where their evidence was considered insufficient to secure a conviction, the statute effectively introduced an official dimension

⁷³ Beattie, 1986, p.271.

⁷⁴ Langbein, 1973, pp.322-3; Glazebrook, 1977, p.584. Stephen accepted that the bail and committal statutes were largely codificatory measures. However, he erroneously claimed that they gave "legal sanction to a practice which had grown up without statutory authority." (1 Stephen, 1883, p.219.)

⁷⁵ Langbein, 1973, p.322.

⁷⁶ Langbein, 1974, p.34.

⁷⁷ Beattie, 1986, p.271.

to allow material preserved in the examination document to have a forensic role. While oral evidence was preferred, the absence of evidential rules excluding depositions or other hearsay evidence from being considered by the trial jury, meant that deficiencies in the case for the prosecution might be made good by pre-trial examinations conducted and recorded by justices.⁷⁸ The records of such examinations functioned "like the notes a modern policemen uses to refresh his memory."⁷⁹ The justices, therefore, served the Crown as "back up prosecutors" at the trial of those accused of felony.⁸⁰

In formalising the questioning of suspected and accused persons, together with the prosecuting brief it conferred upon justices, the committal statute may be properly regarded as laying the foundations of the public prosecutor at common law.⁸¹ The contention that justices of the peace acted in the capacity of public prosecutors in cases of serious crime has been advocated by Langbein who argues that the public prosecutor appeared in consequence of fundamental changes in the structure of jury trial as jurors were ceasing to be self-informing. This, together with the predominant - though not exclusive - reliance on private prosecutions, rendered prosecutions unreliable. The Marian solution of reposing both investigative and prosecutorial duties in the office of the justice of the peace had the advantage of retaining the local aspect of prosecutions, utilizing the knowledge of the community, and of keeping the costs to the Crown of maintain them down to acceptable levels.⁸²

Hay and Snyder,⁸³ take issue with this thesis, arguing that even by the late nineteenth century no public official was responsible for English criminal prosecutions. They maintain that private prosecutions remained paradigmatic until the establishment of the "new" professionalised police forces which became "convenient substitutes for private prosecutors."⁸⁴ The thesis presented by Langbein is not refuted by the argument advanced by Hay and Snyder. While the "new" police were later to assume a prosecutorial role and thus, to marginalise private prosecutions - or, from a crime control perspective, to make

⁷⁸ 1 Chitty, 1816, pp.585-9; Glazebrook, 1977, p.584; Beattie, 1986, p.271.

⁷⁹ Langbein, 1974, p.35.

⁸⁰ 1 Stephen, 1883, pp.222-3.

⁸¹ See Langbein, 1973, pp.313-14; 1974, pp.23-4; Bellamy, 1984, pp.40-1.

⁸² Langbein, 1973, pp.313-35; 1974, pp.34-54.

⁸³ Hay and Snyder, 1989, pp.3-52.

⁸⁴ Hay and Snyder, 1989, pp.26-7; see also Devlin, 1960, pp.7-25; Jackson, 1972, p.155; Cornish and Clark, 1989, p.554.

good the deficiencies in the system of private prosecutions - the argument espoused by Langbein remains tenable. The thrust of that argument does not perforce imply that a formal system of public prosecutions was erected by the committal statute, to displace or undermine private prosecutions. Rather the argument holds that the statute represents the culmination of a development which exploited the weakening medieval community-based scheme of investigation and prosecution by adding an official dimension to that scheme. Hay and Snyder themselves (perhaps inadvertently) support this construction when they observe that the committal statute allowed magistrates to assist private prosecutors to bring individuals to justice.⁸⁵ Further support is provided by Stephen who found that "the justice who had got up the case was the principal witness against the prisoner, and detailed at length the steps he had taken to apprehend him."⁸⁶ Thus, the committal statute had the fundamental effect of transforming the essentially medieval pre-trial investigation and prosecution process into a modernized system geared to the production of evidence indispensable to legitimating convictions without trial.

The examinations prescribed by the statute may not have been intended to have direct evidentiary use since the committal statute expressly allowed justices to delay, for up to two days, their transcription of statements made by the accused, accusers and witnesses. It seems that initially the written examination was not adduced in evidence but used as an *aide-memoire* by the justice, from which the trial judge would frame his examination of the accused.⁸⁷ By dint of subsequent practice, however, the written examination came to acquire direct evidentiary force, facilitating the admission of confessions in evidence elicited from suspected and accused persons under their examination before the justices.⁸⁸

It was not until the early eighteenth century that the status of such extra-judicial confessions began to receive judicial rather than statutory re-evaluation. This was a consequence of the judicial acceptance of the right of defendants to remain silent at their trial, shifting attention to the questioning process of the non-judicial, informal and private committal proceedings where the privilege against compulsory self-incrimination had not yet intruded.⁸⁹

⁸⁵ Hay and Snyder, 1989, p.18.

⁸⁶ 1 Stephen, 1883, pp.222-23. See also Glazebrook, 1977, p.584.

⁸⁷ Langbein, 1974, p.24; Beattie, 1986, p.270.

⁸⁸ Langbein, 1974, pp.27-9, 39-54, 118-25.

⁸⁹ Beattie, 1984, p.271. See also 1 Stephen, 1883, pp.336-7; Wigmore, 1902, p.635; Morgan, 1949, p.12; 3 Wigmore, 1970, p.514; Levy, 1968, pp.263, 322-25.

The inquisitorial features of the committal statute are reminiscent of the inquisitorial procedures of the prerogative courts. How far these procedures were borrowed from those extra-common law courts is unclear.⁹⁰ However, the thirty or so statutes predating the Marian legislation authorising justices to proceed by examination, indicate a degree of evolution that was indigenous to the common law. Indeed, virtually every feature of the committal statute can be located in the pre-Marian legislation.⁹¹ A point that appears to have been overlooked by Stephen who concluded that:

Whatever may have been the reason, the fact is certain that no allusion is made to the holding of any sort of preliminary inquiry by justices before the statutes of Philip and Mary....⁹²

The historical evidence, then, indicates that while the common law repudiated the use of torture,⁹³ the organisation and consolidation of Tudor and early Stuart social and crime control values meant that "[a] complete national system from the humblest office of the parish to the Star Chamber and Privy Council was built up, and in this carefully articulated hierarchy, the justices of the peace were the important connecting link between the Crown and the community."⁹⁴ Under this regime the common law use of confessions elicited under pre-trial examination, served to re-legitimate the petit jury which had largely ceased to be self-informing triers of issues. As Langbein observed, the evidence-gathering role of the justices ensured the regular flow of information to that jury and worked to reinforce the role of the petit jury as trier-of-fact.⁹⁵ Thus, the Marian scheme "became the very core of the law of criminal evidence" in the respect that its examination procedure "secreted the law of evidence" as the investigative and accusatory functions of the presenting jury shifted to the justices who organised detection, detention and prosecution.⁹⁶ The exclusionary rules of evidence were later to develop with the extensive incursion of lawyers into the criminal justice process.⁹⁷ However, the view that the Marian legislation -

⁹⁰ Kauper, 1932, p.1232.

⁹¹ Langbein, 1974, pp.65-77; Bellamy, 1984, pp.8-53.

⁹² 1 Stephen, 1883, p.219.

⁹³ Jardine, 1837, pp.6-10; Veall, 1970, p.25. See also *Felton's Case* (1628) 3 Cobb.St.Tr. 368.

⁹⁴ Beard, 1904, p.85. See also 4 Holdsworth, 1945, p.137; Devlin, 1960, p.4.

⁹⁵ Langbein, 1974, pp.118-25.

⁹⁶ Langbein, 1974, p.119. See also Maitland, 1885, p.133; Kauper, 1932, p.1233.

⁹⁷ Langbein, 1978, p.306.

together with the emergence, over a century later, of the privilege against compulsory self-incrimination - laid the foundations for this incursion runs counter to the assumption that the laws of evidence are "the child of the jury".⁹⁸

It is clear that the preliminary examination process systematised and made mandatory by the Marian legislation constitutes "a development of decisive importance in the history of English criminal procedures and the enforcement of the criminal law."⁹⁹ Justified by Holdsworth as necessary "to secure the observance of the law and protect the state from its enemies",¹⁰⁰ these procedures continued to govern pre-trial investigations and prosecutions until the middle of the nineteenth century.

By their express terms the Marian bail and committal statutes applied only to persons suspected or accused of "Manslaughter or Felony". However, justices soon began to extend their operation to cases of misdemeanour.¹⁰¹ Once apprehended the suspect was invariably remanded in custody until his trial. Bail was seldom granted.¹⁰² In detention he would be closely examined by the justices¹⁰³ in a manner designed to expose his presumed guilt.¹⁰⁴ As Glazebrook points out, there was no conception of the suspect being considered innocent until proved guilty.¹⁰⁵ In practice the prisoner was required to discharge this presumption of guilt. His failure would result in his being returned to custody pending re-examination or trial. There appears to have been no limit to the length of time in which the prisoner could be so detained during the course of the investigation. Writing after the Marian procedure had been in operation for over two hundred and fifty years, Chitty noted "many instances of prisoners being detained much more than twenty days, between their being first brought before a justice, and their commitment for trial, and being brought up for examination several different days during the interval."¹⁰⁶ Thus, even

⁹⁸ Thayer, 1898, p.47.

⁹⁹ Glazebrook, 1977, p.582.

¹⁰⁰ 4 Holdsworth, 1945, p.529.

¹⁰¹ Glazebrook, 1977, p.585.

¹⁰² Hale, 1678, p.98; 1 Stephen, 1883, p.225; Veall, 1970, p.17; Langbein, 1974, p.7; Beattie, 1986, pp.271, 282.

¹⁰³ 1 Chitty, 1816, p.72; 1 Stephen, 1883, p.221; 1 Holdsworth, 1956, p.296; Beattie, 1986, p.271.

¹⁰⁴ 1 Stephen, 1883, p.221.

¹⁰⁵ Glazebrook, 1977, p.587.

¹⁰⁶ 1 Chitty, 1816, p.73.

without the inquisitorial oath of the prerogative courts, the prisoner could be compelled to answer interrogatories fashioned to extort incriminatory admissions.

The preliminary examination was crucial to the ability of the prosecution to construct its case against the accused. It did not contemplate an impartial preliminary inquiry into the suspicions or allegations relevant to the case.¹⁰⁷ The committal statute is silent in respect of the basis upon which justices were to satisfy themselves of the degree of suspicion necessary to justify the detention and examination of individuals. It follows, therefore, that this was left to the discretion of individual justices, thereby, providing them with considerable latitude within which to conduct their inquiries. Indeed, it was not until 1826 that magistrates were expressly enjoined by statute to discharge prisoners for want of a *prima facie* case.¹⁰⁸

The prisoner was prohibited from consulting a lawyer prior to his trial and denied legal representation at his trial. The check against legal representation was relaxed only when it was deemed a point of law arose. The prohibition was legitimated under the contention that proof of guilt would be so manifest that no lawyer could argue against it. It was also felt that legal representation was unnecessary as the judge acted as counsel for the prisoner to safeguard his interests.¹⁰⁹ Prisoners had no notice before trial of the evidence collated against them. Evidence from prosecution witnesses was recorded in private and in the absence of the accused. He, therefore, was not given an opportunity to challenge witnesses before trial. He was also denied a copy of the depositions. Indeed, he was not allowed even to see them.¹¹⁰ The accused was also denied a copy of the indictment since, it was felt, a copy would enable him to take advantage of any technical errors in the case for the prosecution.¹¹¹ That case could be proved on the basis of the depositions taken from the accused and his accusers, though passages of those depositions which were favourable to the accused were frequently suppressed.¹¹²

The preliminary examination existed as a crucial component of this process. The examination "fitted a particular form and conception of [the accused's] trial in which it was

¹⁰⁷ 4 Holdsworth, 1945, p.529; 1 Holdsworth, 1956, pp.295-6; Veall, 1970, p.17; Beattie, 1986, p.271.

¹⁰⁸ 7 Geo.4, c.64 (1826). And see 1 Chitty, 1816, p.89; Devlin, 1960, p.6; Glazebrook, 1977, pp.585-6; Beattie, 1986, pp.274-9.

¹⁰⁹ Levy, 1968, p.322; Veall, 1970, p.18; Baker, 1977, pp.36-8.

¹¹⁰ 1 Stephen, 1883, p.221. See also 1 Chitty, 1816, p.83; Devlin, 1960, pp.5-6.

¹¹¹ Veall, 1970, p.17; see also Emlyn, 1730, p.xxxi; Beattie, 1986, pp.271-77.

¹¹² Veall, 1970, p.19.

believed that the truth would be most clearly revealed if the prisoner was confronted with the evidence only in the courtroom so that the jury could judge the quality of his immediate, unprepared response."¹¹³ Such features can be properly regarded as expressions of the predominant considerations of crime control which worked to produce a criminal justice process that afforded the suspected individual only a nominal ability to oppose the capacity of the Crown to obtain convictions. To this end, the preliminary examination was of critical significance. While confessions were not a *sine qua non* for convictions, they were, nevertheless, an important objective of the examination process since they were conducive to the successful prosecution to conviction of individuals suspected of involvement in criminal activity. Under these procedures the suspect could be drawn into the prosecution process merely on the basis of the suspicions justices entertained, that is, in the absence of a due and specific accusation. Once within the process systematised by the Marian statutes the suspect would be subjected to interrogatories specifically designed "to wring out of him a confession of his guilt, unsworn, or enough damaging testimony to put him on trial for a crime."¹¹⁴ The coercive pressures the suspect was exposed to and the central role confessions played in the criminal justice process are related by Professor Levy in the following comment:

Secret examinations characterized by bullying and incriminatory interrogatories were common practice. Justices of the peace were prosecutors and policemen as well as magistrates. Any admissions which they might extort from a suspect could be introduced against him as evidence at his trial ... an actual confession was as good as his plea of guilt.¹¹⁵

The inherent presumption of guilt within the common law criminal process resembled the investigative and prosecutorial practices of the prerogative courts of Star Chamber and High Commission. Indeed, under the common law machinery of criminal justice the suspect "gained no greater advantages ... and in this preliminary inquisition remained virtually gagged and bound until the nineteenth century."¹¹⁶

¹¹³ Beattie, 1986, p.271.

¹¹⁴ Levy, 1968, p.325.

¹¹⁵ *Ibid.*

¹¹⁶ Allen, A.K., 1953, p.149.

Conclusion

The interrogation of suspects was a central feature of the procedures of the discredited prerogative courts. It remained a crucial aspect of the officialised common law process of criminal justice. That social and crime control considerations continued to prevail over the interests of individuals brought into that process was adverted to by Stephen, who remarked:

I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial....¹¹⁷

Examination and prosecutorial responsibilities, vested in the single office of the justice by the Marian statutes, had the gradual effect, during the ensuing centuries, of absorbing the functions of the presentment or grand jury. This was a consequence, Devlin argues, of the "efficient and regular" inquiries justices made leaving "little for the grand jury to do" since, in practice, "it was really the justices who decided whether the accused should stand his trial."¹¹⁸ The grand jury inquiry, therefore, was rendered superfluous "for it merely duplicated the formal inquiry that was being conducted by the justices."¹¹⁹ The function of the grand jury contracted as it was left, in effect, to perform a ceremonial role until its formal abolition in the twentieth century.¹²⁰

The disintegration of pre-trial investigations by the populace, as represented by the grand jury, was accompanied by the gradual transformation of preliminary examinations from an inquisitorial process into a judicial inquiry, with justices acting in a judicial capacity.¹²¹ By the middle of the nineteenth century this alignment had received statutory recognition.¹²² These developments, in turn, occurred against a background which saw the formal creation and establishment of professional police forces from 1829, allowing the formerly

¹¹⁷ 1 Stephen, 1883, p.225.

¹¹⁸ Devlin, 1960, p.5. See also Maitland, 1885, p.132.

¹¹⁹ Devlin, 1960, p.7. See also Baker, 1977, p.20.

¹²⁰ See both the Administration of Justice (Miscellaneous Provisions) Act, 1933, and the Criminal Justice Act, 1948, which finally abolished the grand jury.

¹²¹ 1 Stephen, 1883, p.221; Kauper, 1932, pp.1234-5; 1 Holdsworth, 1956, p.297; Devlin, 1960, pp.7-9; Baker, 1977, pp.16-17.

¹²² 11 & 12 Vict. c.42 (1848).

pre-eminent position of the justice of the peace in the English prosecution process to be reconfigured.¹²³ This new organ of social control came to acquire competence over the investigative and prosecutorial functions that were previously conducted by the justices in a system that, in form, remained based on the prosecutorial initiative of private citizens.¹²⁴ The state, in the "new" police, thereby added a novel dimension to the officialised and progressively bureaucratised system of criminal justice. With the result that the focal point of the process under which individuals could be arrested, detained and examined in custody, on the basis of suspicions held by agents of the state, shifted from formal judicialized committal proceedings to informal and for some time unregulated, interrogative practices of the police.¹²⁵ Such practices were largely unaffected by the reforms, dating from the Parliamentary conflicts with the prerogative governments of the Crown, which purported to ameliorate the position of the suspect in relation to the state at both the trial and later committal phases of the prosecution process. These reforms - together with the abolition of the inquisitional oath, the courts of Star Chamber and High Commission, the disuse of torture to coerce confessions - included the state conceding to suspects the right to legal representation, to inspect depositions taken against them and the right to be present when prosecution witnesses were examined.¹²⁶ These and other related reforms were, to a great extent, set in motion by the movement that led to the judicial recognition of the privilege against compulsory self-incrimination from the late seventeenth and early eighteenth centuries.¹²⁷ The principles upon which the privilege was founded began to have an impact upon the inquisitorial procedures that obtained under the examining justices as the courts, in the eighteenth and early nineteenth centuries, began to acknowledge the principle that extra-judicial confessions produced in evidence against accused persons should, as a precondition to admission, be shown to have been freely and voluntarily made.¹²⁸ The nascent rules governing the admissibility of criminal evidence, therefore, began to address concerns not only for the circumstances in which incriminatory admissions and confessions were obtained but also for the status and reliability of

¹²³ Devlin goes further by suggesting that the judicialisation of the office of justice of the peace "would not have been possible" without the creation of another organ of criminal inquiry, the police. (Devlin, 1960, p.7.) See also Plucknett, 1956, p.432.

¹²⁴ Hay, 1983, pp.167-86; Hay and Snyder, 1989, pp.26-27; Cornish and Clark, 1989, p.554.

¹²⁵ Baker, 1977, pp.16-17.

¹²⁶ 1 Holdsworth, 1956, p.297.

¹²⁷ 1 Stephen, 1883, pp.749-52; Wigmore, 1902, pp.627-36; Mirfield, 1985, pp.43-7.

¹²⁸ 1 Chitty, 1836, p.83; Kauper, 1932, pp.1233-4.

confession evidence. Coerced confessions as evidence capable of validating conviction were to be re-legitimated behind the emerging judge-made and somewhat protean, "voluntariness rule".

LEGITIMATING CONFESSIONS THROUGH "VOLUNTARINESS"

Introduction

The collapse of prerogative government in the seventeenth century, argued Holdsworth, "ensured the prevalence of common law rules and method."¹ Nevertheless - in spite of the abolition of *ex-officio* oath inquisitorial proceedings of the Star Chamber and ecclesiastical courts and the abandonment of official torture - the common law machinery of criminal justice retained a panoply of measures with which to give expression to the social and crime control concerns of the state and continued to greatly advantage the state in criminal proceedings brought against individual citizens.² Prisoners accused of either felony or treason were generally denied the assistance of counsel.³ The accused was refused a copy of the indictment⁴ and prevented from calling his own witnesses.⁵ At the preliminary hearing he would be questioned by the examining justice. Later at his trial he would be subjected to further interrogatories by judge and prosecuting counsel. Each examination was designed to obtain material which would secure the conviction of the prisoner.⁶ Hearsay evidence was freely admitted.⁷ The absence of clear rules relating to the admissibility of evidence and to the conduct of criminal trials also advantaged the state.⁸

Confronted by such a wide array of state power, individuals accused of crime "had a very slender opportunity of making an effective defence."⁹ According to Stephen, such an individual "had no means of knowing what evidence had been given against him. He was not allowed as a matter of right, but only as an occasional favour, to have either counsel or solicitor to advise him as to his defence, or to see his witnesses and put their evidence in

¹ 9 Holdsworth, 1949, p.209.

² *Ibid.*, p.223.

³ 2 Holdsworth, 1923, pp.107, 312.

⁴ 3 Holdsworth, 1944, p.615.

⁵ 9 Holdsworth, 1944, p.224.

⁶ *Ibid.*, pp.224, 232-3.

⁷ 1 Stephen, 1883, pp.399-401; 9 Holdsworth, 1944, p.229.

⁸ 1 Stephen, 1883, p.399; 9 Holdsworth, 1944, p.224.

⁹ 9 Holdsworth, 1944, p.225. See also Levy, 1968, pp.301-222.

order. When he came into court he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him".¹⁰

From the middle of the seventeenth century, however, while the state "rigidly insisted on all the advantages which the older rules gave to it,"¹¹ the entrenchment of common law procedures meant that "humaner methods of procedure" began to emerge.¹² According to one review of the late seventeenth and early eighteenth century trial process:¹³

the whole spirit and temper of the criminal courts, even in their most irregular and revolutionary proceedings, appears to have been radically changed from what it had been.... In every case, so far as I am aware the accused person had the witnesses against him produced face to face, unless there was some special reason (such as sickness) to justify the reading of their depositions. In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned the prisoners usually refused to answer. The prisoner was also allowed, not only to cross-examine the witness against him if he thought fit, but also to call witnesses of his own.¹⁴

This account presents a picture of post-Revolution criminal trial procedures that were comparatively benign in their treatment of individual defendants. However, this picture of judicial indulgence must be regarded with caution since, in the first place, "most persons accused of crime [were] poor, stupid and helpless."¹⁵ Such persons, unaided by counsel, could not be expected to conduct an effective defence and may have been ignorant of the concessions to which judges were increasingly prepared to assent.¹⁶ Secondly, the appearance of liberalised trial procedures,¹⁷ must be considered within a criminal justice context that embraces its crucial pre-trial or extra-judicial features. The preliminary phase of the prosecution process continued to afford the state extensive coercive powers with

¹⁰ 1 Stephen, 1883, p.398.

¹¹ 9 Holdsworth, 1944, p.283.

¹² 1 Stephen, 1883, p.385; see also 9 Holdsworth, 1944, pp.230-31; Levy, 1968, pp.320-21.

¹³ 1 Stephen, 1883, pp.324-427.

¹⁴ *Ibid.*, p.358.

¹⁵ *Ibid.*, p.442.

¹⁶ See 9 Holdsworth, 1944, p.233. Levy argues that despite the reforms of the mid-seventeenth century the courts remained partisan instruments of the Crown. (Levy, 1968, p.319.)

¹⁷ See 9 Holdsworth, 1944, p.230.

which to construct its case against the accused. The examination procedures that had been routinized under the Marian Statutes¹⁸ survived the erosion of the "unduly harsh" inquisitorial methods that had characterised the procedures of the discredited Tudor and early Stuart courts.¹⁹ Thus, while inquisitorial forms of trial could be safely discarded to legitimate the "humaner methods" of common law trial, the inquisitorial character of pre-trial investigations was left, to a substantial extent, intact.

Clearly, the treatment of the defendant at his trial cannot be divorced from the extra-judicial treatment he receives as a suspect.²⁰ The pre-trial investigative phase of the prosecution process continued to provide the state with wide powers for the elaborate preparation of its case against the accused.²¹ Its law enforcement officials, firstly, the justices of the peace - empowered, in effect, to act as public prosecutors²² - and later, by the middle of the nineteenth century, the police, were both legitimated as key actors in this prosecution process. As the largely judge-made reforms introduced to ameliorate the position of the accused at his trial began to become established as rules of law - particularly the privilege against compulsory self-incrimination and the voluntary confession rule - the "new" professionalised police came to supersede magistrates in the performance of the critical pre-trial construction of the case for the prosecution.

The power of magistrates to interrogate suspects was severely restricted in the nineteenth century by statute.²³ By this time, however, the "new" police, without statutory licence, had assimilated the authority to interrogate suspects in custody, thus bringing into sharp relief questions concerning judicial attitudes to the reception in evidence of incriminatory admissions made to police officers; the adequacy of the law governing the admissibility of confessions; the protection of accused persons from being compelled to answer questions inviting incriminatory replies; the acceptable limits of police investigations; and, finally, the propriety of police interrogations.

During the period which saw the development of the pre-trial expression of the privilege against compulsory self-incrimination in the form of the evidential requirement for

¹⁸ 1 & 2 Phil. and Mar. c.13 (1554); 2 & 3 Phil. and Mar. c.10 (1555).

¹⁹ 9 Holdsworth, 1944, pp.230-31; Levy, 1968, pp.323-34.

²⁰ See Neasey, 1969, p.484; Bottoms and McClean, 1976, p.230; Baldwin and McConville, 1977, p.105.

²¹ 9 Holdsworth, 1944, pp.226, 228.

²² Langbein, 1974, pp.23-4; Beattie, 1986, p.271.

²³ Section 18 of the Indictable Offences Act, 1848, required magistrates to inform suspects that they were not obliged to answer questions put to them during preliminary examination. See *Pettit* (1850) 4 Cox C.C. 164, for the view that magistrates could not ask the accused questions bearing on the offence charged.

statements to be given freely and voluntarily, such questions would be addressed in ways which would ensure the continued centrality of the confession as sufficient evidence of guilt. Indeed, while the voluntariness requirement worked to exclude extra-judicial admissions extorted from suspects by persons in authority through the use of "improper" inducements, conflicting judicial decisions respecting the requirement would effectively serve to legitimate the power state official exercised over suspects in the pre-trial process to obtain confession evidence.

The Privilege Against Self-Incrimination and the Evidential Requirement of Voluntariness

As part of the struggle to legitimate common law procedures, judges, from the middle of the seventeenth century, began to permit witnesses for the accused to give unsworn evidence at trial.²⁴ This practice was subject to the discretion of individual judges. Even when granted, the unsworn testimony of witnesses for the defendant was of limited value. This was a consequence of the pre-seventeenth century practice prohibiting witnesses for the accused from giving evidence on their oaths against the cause of the Crown. A practice which continued to enjoy the support of many judges.²⁵ "The disadvantage to the accused", Levy explains, "was evident from the fact that unsworn testimony did not carry the same weight as testimony given under oath, a fact that judges as well as prosecutors pointed out to juries."²⁶ Before the end of the seventeenth century judges began to admit both witnesses and counsel for defendants. Again this appears to have been an entirely non-statutory initiative.²⁷

The Treason Act of 1696²⁸ brought consistency to what hitherto had been a matter of judicial discretion. The Act permitted defendants to subpoena witnesses to appear to give their evidence on oath.²⁹ This right was extended to all felony cases in 1701.³⁰ The 1696

²⁴ 9 Holdsworth, 1944, p.230.

²⁵ See, for example, *Hullet's Trial* (1660) 5 Cobb.St.Tr. 1185, p.1192.

²⁶ Levy, 1968, p.321; see also *Hullet's Trial*, *ibid.*, pp.1191-2

²⁷ See *Roswell's Case* (1684) 10 Cob.St.Tr. 147, *per* Jeffreys, LCJ p.267.

²⁸ 7 Will.3, c.3 (1695).

²⁹ See generally Parker, 1984, p.158; see also 1 Stephen, 1883, p.416; Thayer, 1898, p.161.

³⁰ 2 Anne., c.12 (1701); see also 1 Anne., c.9 (1702).

Act also provided for persons accused of treason to be presented with a copy of the indictment at least five days before trial, thereby unseating a practice which appears to have been a rigidly enforced principle of law.³¹ The accused, under the same Act, also became entitled to make his "full defence by counsel learned in the law". Legal representation in criminal matters had been strongly resisted. It was seen as running counter to the legal theory that held that it was for the court, in matters of law as distinct from matters of fact, to act as counsel for the defendant.³² However, since the prohibition against counsel was generally relaxed - for those defendants who could afford their services - in cases of minor trespass,³³ the legal theory opposing legal representation was difficult to sustain in practice.³⁴ This notwithstanding, the defendant was normally forced to make his own defence, unassisted by counsel,³⁵ where he would be confronted by an elaborately prepared case, to which he was expected to make an unprepared response, upon which the jury were to assess his guilt or innocence.³⁶ However, by the end of the seventeenth century, as Stephen noted:

A practice had sprung up ... by which counsel were allowed to do everything for prisoners accused of felony except addressing the jury for them....³⁷

This practice did not receive statutory force until 1836.³⁸ However, suspects detained in custody for examination before magistrates were not entitled, as of right, to engage a

³¹ In *Colledge's Case* (1681) 8 Cobb.St.Tr. 541, p.570, North, LCJ declared: "No man can have a copy of the indictment in law." And in *Roswell's Case* (1684) 10 Cobb.St.Tr. 147, p.268, Jeffreys, LCJ remarked: "the practice has been always to deny a copy of the indictment. And, therefore, if you ask me as a judge, to have a copy of the indictment ... I must answer you, Shew me any precedents where it was done...."

³² For example in *Twyn's Case* (1663) 6 Cobb.St.Tr. 513, pp.516-17, Hyde, CJ responded to a request for counsel with the remark: "I will tell you, we are bound to be counsel with you in point of law; that is, the court, my brethren and myself, are to see that you suffer nothing for your want of knowledge in matter of law ... in this case the law does not allow you counsel to plead for you; but in matter of law we are counsel for you, and it shall be our care to see that you have no wrong done you." See also *Colledge's Case*, *ibid.*

³³ See *Roswell's Case* (1684) 10 Cob.St.Tr. 147, p.267.

³⁴ Levy, 1968, p.322.

³⁵ *Ibid.*; Beattie, 1986, p.352.

³⁶ 1 Stephen, 1883, pp.336-7; 9 Holdsworth, 1944, p.229.

³⁷ 1 Stephen, 1883, p.424; see also Langbein, 1978, pp.307-16; Beattie, 1986, pp.356-62.

³⁸ Prisoners' Counsel Act, 6, 7 Will.4, c.114 (1836).

person skilled in law at any stage of the preliminary investigation.³⁹ Thus, in the period following the acute political and constitutional turmoils of the seventeenth century, the "humaner methods" introduced to legitimate the common law mode of trial as the only viable alternative to the inquisitorial methods of the prerogative courts,⁴⁰ appear to have had little immediate impact on the inquisitorial procedures that obtained at the pre-trial phases of the criminal process.⁴¹ Indeed, the pre-trial process was only affected, and then only indirectly, some time after the privilege against compulsory self-incrimination received judicial recognition.

The principle that a defendant ought not to be compelled to answer questions that tended to incriminate him had been widely acknowledged by the courts from the middle of the seventeenth century. However, the piecemeal development of the privilege was noted by Wigmore who found that the judicial "habit of questioning and urging the accused died hard - did not disappear, indeed, until the 1700s had begun."⁴² Levy points out that the principle of disqualification for interest, coupled with the privilege, contributed to the final demise of the practice of judges interrogating accused persons at their trial.⁴³ This principle, which originated in civil cases, was based on the assumption that an individual who had a personal and direct interest in the verdict of the court was "so irresistibly tempted to perjury that his testimony was regarded as untrustworthy."⁴⁴ By the early eighteenth century, therefore, the privilege against self-incrimination, which protected the accused from judicial questions which would require him to condemn himself out of his own mouth, had combined with the principle of disqualification for interest to ensure that the accused was in effect excluded from his own trial. Thus, the procedural reforms conceded by judges and later endorsed by statute, eventually made it possible for defendants to present their defence through counsel and witnesses. The defendant retained the right to make an unsworn statement to the court in answer to the charge but the non-statutory development of the privilege, while protecting him from exposure to pressing interrogatories, also rendered him incompetent to testify an oath at his own trial.

³⁹ See *Cox v. Coleridge* (1822) 1 Barn. & Cress. 37.

⁴⁰ 9 Holdsworth, 1944, pp.230-35.

⁴¹ See Levy, 1968, p.325.

⁴² 8 Wigmore, 1961, p.291.

⁴³ Levy, 1968, p.324.

⁴⁴ *Ibid.*

The desuetude of official torture had, also by the early eighteenth century, become a source of common law pride as demonstrated by the comment that:

In other countries, Racks and instruments of torture are applied to force from the prisoner a confession, sometimes of more than is true; but this is a practice which Englishmen are happily unacquainted with, enjoying the benefit of that just and reasonable maxim, "Nemo tenetur accusare seipsum".⁴⁵

The establishment of the privilege against self-incrimination was, therefore, closely linked both conceptually and historically with the repudiation of torture. Indeed, the emergence and acceptance of the freedom from the compulsion of questions designed to incriminate the accused coexisted with and contributed to the demise of official torture. As Moreland pointed out, the absence of the privilege conduces its inevitable concomitant, namely, torture.⁴⁶ To put it in the words of Levy:

Where there is a right against self-incrimination, there is necessarily a right against torture.⁴⁷

The threat of torture, however, continued for some time to be employed to exert a coercive influence over suspects to compel information, admissions and confessions. For example, in *Tonge's Case*⁴⁸ the defendant, indicted for high treason, was appraised by the court of the evidence against him which included his own confession. To this the defendant replied: "I confess I did confess it in the tower, being threatened with the rack."⁴⁹ The allegation made by the defendant was not investigated by the court which, in admitting the confession, concluded that a confession made "before him that hath power to take an examination" is admissible in evidence providing it be "voluntarily made without torture."⁵⁰

The court also considered the status of evidence elicited from a witness - in this instance, one of the five co-accused - by the extra-judicial promise of a pardon. Hale, LCB was of the opinion "that if one of these culpable persons be promised his pardon, on condition to

⁴⁵ Emlyn, 1730, p.xxv.

⁴⁶ Moreland, 1956, pp.270, 275.

⁴⁷ Levy, 1968, p.324.

⁴⁸ *Tonge's Case* (1662) 6 How.St.Tr. 225.

⁴⁹ *Ibid.*, p.259.

⁵⁰ *Ibid.*, p.228, n.2.

give evidence against the rest, that disableth him to be a witness ... because he is bribed by saving his life to be a witness...."⁵¹ This opinion did not carry the support of his judicial brethren. However, they all concluded that while a promise of a pardon would not render such witnesses incompetent to give evidence "no such promise should be made, or any threatenings used to them in case they did not give full evidence."⁵² This remark permits the conclusion that while the court sought reliable evidence, if such evidence was to have that quality it ought to be voluntarily given. The ruling of the court in respect of the witness, therefore, appears to conflict with its attitude to the threat of torture which the defendant claimed compelled him to confess. There would seem to be a clear parallel between the unreliability of statements made by witnesses as by suspects after threats or promises. It seems that rather than establish a rule capable of excluding confession evidence of doubtful reliability, the judges intended to guide the practices of those authorised to conduct extra-judicial examinations. Nevertheless, the ruling of the court in *Tonge* suggests a movement towards the formulation of an exclusionary rule, with reliability through voluntariness as its primary rationale, well before the end of the seventeenth century.⁵³

The illegitimacy of involuntary confessions was statutorily acknowledged in the last decade of the century when the 1696 Treason Act required indictments for high treason to be based upon the testimony of two lawful witnesses "unless the party indicted and arraigned or tried shall willingly without violence in open court confess...."⁵⁴ Before the turn of the century, considered legal opinion had begun to conflate the *nemo tenetur accusare seipsum* maxim both with the illegitimacy of torture and with the requirement that confessions be free from any form of coercion if they were to be considered reliable. Gilbert, LCB, in his work published posthumously in 1754, commented that although a confession under the common law is to be regarded as the best evidence of guilt "this confession must be voluntary and without Compulsion; for our Law in this ... will not force any Man to accuse himself; and in this we do certainly follow that Law of Nature, which commands every Man to endeavour his own Preservation; and therefore Pain and

⁵¹ *Ibid.*, p.227, n.3.

⁵² *Ibid.*

⁵³ See Mirfield, 1985, pp.45-6.

⁵⁴ 7 Will.3, c.3 (1695).

Force may compel men to Confess what is not the truth of facts, and consequently such extorted Confessions are not to be depended on."⁵⁵

That the voluntariness principle and the privilege against compulsory self-incrimination had become inextricably linked is illustrated by the observation made by Stephen that "the general maxim that confessions ought to be voluntary is historically the old rule that torture for the purpose of obtaining confessions is, and long has been, illegal in England."⁵⁶ For Wigmore, however, the law against the reception in evidence of involuntary confessions and the privilege against self-incrimination have been erroneously confused both in history and in practice. He contends that "the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents."⁵⁷

While the historical evidence supports the view that the privilege was "fully established by 1680."⁵⁸ It does not of necessity follow that the development of the exclusionary rule by the end of the eighteenth century was entirely independent of privilege. There is, in short, at least one respect in which the two principles have been conceptually connected, namely, in the protection they purport to afford the accused from being compelled to acknowledge his own guilt. Essentially, therefore, "voluntariness" is a requirement common to both principles.⁵⁹

An Exclusionary Rule of Law

The earliest indication that the voluntariness principle had become a precondition to the admissibility of extra-judicial confessions is found in *White's Case* decided in 1741.⁶⁰ White had pleaded not guilty to the charge of murdering a "gentleman of distinction." The prosecution sought to prove his guilt with a confession White made before the examining justice. As the examination was being read to the court, counsel for the prisoner asked

⁵⁵ Gilbert, 1754, quoted in Levy, 1968, p.327. Gilbert died in 1726. The second edition of his work, *The Law of Evidence*, appeared in 1760 where the view above was repeated, p.140.

⁵⁶ 1 Stephen, 1883, p.441.

⁵⁷ 8 Wigmore, 1970, p.401.

⁵⁸ *Ibid.*

⁵⁹ See Levy, 1968, pp.495-7.

⁶⁰ *White's Case* (1741) 17 How.St.Tr. 1079.

whether the confession was voluntarily made "[f]or if it was not voluntarily [sic], it ought not to be read." Mr. Foster, the Recorder, considered this to be "an improper question" since the prisoner had not "made it a part of his case, that his confession was extorted by threats, or drawn from him by promises." Had he done so "it would have been proper for us to enquire by what means the confession was procured: but as the prisoner alleges nothing of that kind, I will not suffer a question to be asked ... which carries in it a reflection on the magistrate before whom the Examination was taken...."⁶¹ The confession was received in evidence. White was convicted and sentenced to death. The remarks the Recorder made suggest that the voluntariness principle had by this date become one capable of excluding evidence deemed to have been extracted under the compulsion of threats or promises. However, it had not, it would seem, become a firm rule of law.

Wigmore, in his survey of the early development of the exclusionary rule, found no indication of its existence in the "treatise of Hale and Butler [published in the 1680s] where the doctrine would naturally be mentioned."⁶² Mirfield, placing his review of the early development of the doctrine more closely to the decision in *White* found it "surprising that both Bacon and Nelson writing in the mid-1730s, offer no hint of any such exclusionary principle."⁶³ The Recorder in *White*, therefore, may be taken to have stated what was then a judicially approved principle that had yet to acquire full exclusionary force. The case of *Rudd*,⁶⁴ however, indicates that by 1775 the principle may have been employed to exclude coerced confessions from criminal trials. As the presiding judge, Mansfield LCJ observed:

The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examinations and confessions have not been made use of against them on their trial.⁶⁵

This *dictum* is ambiguous as it may refer to the practice of judges or, indeed, that of examining justices, who as prosecutors may have been reluctant to make use of such

⁶¹ *Ibid.*, p.1085.

⁶² 8 Wigmore, 1970, pp.295-6.

⁶³ Mirfield, 1985, pp.42-3.

⁶⁴ *Rudd* (1775) 1 Leach. 115.

⁶⁵ *Ibid.*, p.118.

confessions when the courts were becoming increasingly hostile to coerced confessions as evidence of guilt.⁶⁶

In *Warickshall*,⁶⁷ decided eight years after *Rudd*, it became clear that the voluntariness principle was finally affirmed as a firm exclusionary rule of law. Jane Warickshall was charged with and confessed to having received stolen goods. As a result of this confession the goods were found concealed in her bed. At her trial the confession was ruled inadmissible "having been obtained by promises of favour." Her counsel argued that "as the fact of finding the stolen property had been obtained through means of an inadmissible confession, the proof of the fact ought also be rejected, for otherwise the faith which the prosecutor had pledged would be violated, and the prisoner made the deluded instrument of her own conviction." Nares, J and Eyre, B rejected this contention arguing that:

it is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith: no such rule ever prevailed ... confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt....⁶⁸

The court ruled that "although confessions improperly obtained cannot be received in evidence," this principle had "no application whatever as to the admission or rejection of facts" obtained in consequence of such confessions.⁶⁹ However, in a clear expression that the rule was capable of excluding coerced confessions the court confirmed that:

a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.⁷⁰

As the report of the case does not reveal the character of the favour promised to the accused, it may be assumed that in basing its decision to exclude the involuntary

⁶⁶ See 8 Wigmore, 1970, p.297; Mirfield, 1985, p.47.

⁶⁷ *Warickshall* (1783) 1 Leach. 263.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, p.264.

⁷⁰ *Ibid.*

confession on its questionable reliability, the court was not concerned to assess the precise causal effect of the promise upon the veracity of the confession or, indeed, to leave that assessment to the jury.⁷¹

Thus, before the end of the eighteenth century, the voluntariness requirement had come to govern the admissibility in evidence of extra-judicial confessions and, as such, had become established as part of the emergent rules of criminal evidence.

An early illustration of the judicial operation of the exclusionary rule is found in the case of *Thompson*,⁷² decided in the same year as *Warickshall*. The accused was apprehended and questioned by the Receiver-General for Somerset in connection with the theft of a £30 bank note. Upon his interrogation of the accused, the explanation offered by the prisoner was not accepted by the Receiver-General who told the prisoner that unless he gave a more satisfactory account he would take the prisoner before a magistrate. Thereupon, the prisoner made a confession. Counsel for the defendant contended that the actions of the Receiver-General "amounted to a threat to take the prisoner into custody unless he would make a confession." The confession should, therefore, be excluded since even "if it was not considered as a threat, it was certainly a promise, by implication, and indirectly, that if he did give a more satisfactory account he should not be taken before a Magistrate."⁷³ In his judgment Hotham, B felt that it was "almost impossible to be too careful upon this subject." He did not accept that the prisoner was subjected to what could be considered a threat, however, he agreed that the "prisoner was hardly a free agent at the time" at which he was under "a strong invitation" to confess.⁷⁴ The judge was not concerned with the specific question of whether the inducement stemmed from a threat or a promise. The key to his decision to exclude the confession lay in his assessment of its voluntariness. He, therefore, concluded his judgment as follows:

I must acknowledge, that I do not like to admit confessions, unless they appear to have been made voluntarily, and without any inducement. Too great a chastity cannot be preserved on this subject, and I am of the opinion, that under the present circumstances the prisoner's confession, if it was one, ought not to be received.⁷⁵

⁷¹ See Mirfield, 1985, p.48.

⁷² *Thompson* (1783) 1 Leach. 291.

⁷³ *Ibid.*, p.292.

⁷⁴ *Ibid.*, p.293.

⁷⁵ *Ibid.*

The doubt Hotham, B expressed in respect of the alleged confession is an equivocal one. He may have been intimating that he regarded all coerced admissions as unreliable and therefore unsuitable to mount and sustain a conviction. Alternatively, the remark may have been intended to reproach prosecutors to exhort them not to employ inducements in their efforts to secure confessions and to indicate to them that the right to remain silent at trial would be rendered ineffectual if suspects could be pressed by inducements to make involuntary statements which were then received in evidence.⁷⁶

The exclusionary rule as expounded in *Warickshall*, *Thompson* and in the case of *Cass*⁷⁷ appears to have been limited in application to coerced confessions rendered unreliable by threats or promises. Yet these cases make no explicit reference to whether incriminatory replies made to extra-judicial questions put to the prisoner might be treated as *per se* involuntary admissions and thus be subject to the exclusionary rule. These decisions were, apparently, more concerned to decide whether there had been *any* threat or promise which would impair the voluntariness of statements made in the extra-judicial context and adduced in evidence against their author.⁷⁸

Wigmore argues that from the formation of the exclusionary rule in the latter part of the eighteenth century, the subsequent "history of the doctrine is merely a matter of the narrowness or broadness of the exclusionary rule."⁷⁹ He suggests that from the outset confessions were declared inadmissible in evidence only when promises or threats worked to raise questions concerning the reliability of the ensuing confession.⁸⁰ The implication being that from its inception the exclusionary rule was so narrow in scope that "[i]t was for a long time the clear unquestioned law in England that the mere circumstances of *arrest*, even when combined with the circumstance that the confession was made in answer to

⁷⁶ See also *Cass* (1784) 1 Leach. 293, n.(a), where a person suspected of theft was promised favourable treatment if he confessed. At the trial Gould, J instructed the jury to "acquit the prisoner; for that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession."

⁷⁷ *Ibid.*

⁷⁸ See Mirfield, 1985, pp.47-49.

⁷⁹ 3 Wigmore, 1970, p.297.

⁸⁰ *Ibid.*

questions put by the custodian, did not exclude the confession,⁸¹ since "there was no general sentiment against them - no 'prima facie' doubt of their propriety."⁸²

Wigmore relied on the 1791 case of *Lambe*⁸³ to demonstrate this point. The accused in that case was indicted for breaking and entering a house where he "feloniously and burglariously" removed certain goods. When apprehended he was taken before a magistrate for examination in accordance with the Marian statutes.⁸⁴ The examination contained the "full and voluntary confession" of the prisoner who declined to endorse it with his signature. The magistrate also neglected to sign the examination. Counsel for the prisoner argued that the governing statute required the examination to be authenticated by the signatures of the prisoner and examining magistrate and that if these ceremonies were omitted the confession could not be received against the prisoner.⁸⁵ Wilson, J admitted the examination. The prisoner was found guilty. The judgment was, however, respited for the opinion of the Judges on the question of the admissibility of the examination. The Judges, led by Grose, J, ruled that the examination was "well received in evidence." Wigmore places emphasis on that part of the judgment which states that:

Confessions of guilt made by a prisoner to any person at any moment of time, and at any place, subsequent to the perpetration of the crime and previous to his examination before the magistrate, are at common law admissible in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true.⁸⁶

This statement would seem to lend support to the thesis advanced by Wigmore. However, Grose, J also stressed that only a "free and voluntary confession made by a person accused of an offence is receivable in evidence against him, whether such confession be made at the moment he is apprehended, or while those who have him in custody are conducting

⁸¹ *Ibid.*, p.502 (emphasis supplied).

⁸² *Ibid.*, p.297.

⁸³ *Lambe* (1791) 2 Leach. 552.

⁸⁴ 1 & 2 Phil. and Mar. c.13 (1554); 2 & 3 Phil. and Mar. c.10 (1555).

⁸⁵ *Lambe* (1791) 2 Leach. 552, pp.552-3.

⁸⁶ *Ibid.*, pp.554-5. See 3 Wigmore, 1970, pp.297, 502, 510-11.

him to the magistrates, or even after he has entered the house of the magistrate for the purpose of undergoing his examination."⁸⁷

The decision in *Lambe*, therefore, does not support the contention that the presumption in favour of "voluntariness" was vitiated *only* when the courts found promises of threats had operated to induce the accused to confess. Grose, J made no mention of the scope of the voluntariness test as it might relate to the reliability of confessions resulting from unauthorised extra-judicial questions put to suspects by individuals interested in securing convictions.

Under the Marian legislation, magistrates had for some time been empowered to employ inquisitorial techniques - provided, following the formulation of the exclusionary rule, such techniques did not exhibit explicit threats or promises to compel a suspect to confess. However, the requirement of voluntariness, as articulated in the cases decided before the end of the eighteenth century, in suggesting that *any* threat or promise could impair the voluntariness of a confession, did not exclude the possibility of extra-judicial questions being viewed as capable of subverting the privilege against compulsory self-incrimination so as to render confessions involuntary and accordingly inadmissible. Thus, in so far as the argument presented by Wigmore constitutes an attempt to identify a clear pre-nineteenth century trend in favour of the reception of confession evidence, irrespective of the extra-judicial context in which they were obtained - providing the confession did not flow from specific threats or promises - the argument has not been satisfactorily made.

This notwithstanding, the view advanced by Wigmore enabled him to characterise the period beginning with the nineteenth century until the mid-century decision of *Baldry*⁸⁸ as one giving the "appearance of sentimental irrationality".⁸⁹ He argues that from the beginning of this period "the whole attitude of judges changed." They developed "a general suspicion of all confessions, a prejudice against them ... and an inclination to repudiate them upon the slightest pretext."⁹⁰ Mirfield agrees that "during the period from 1800 to 1852, judges seem, for the most part, to have been keen to exclude confessions."⁹¹ Such comments carry the unstated assumption that judges cooperated or conspired with each other as a unitary body to reject confessions out of some weak and misplaced

⁸⁷ *Lambe* (1791) 2 Leach. 552, pp.554.

⁸⁸ *Baldry* (1852) 2 Den. 430.

⁸⁹ 3 Wigmore, 1970, p.298.

⁹⁰ *Ibid.*, p.297. See also 1 Stephen, 1883, p.447.

⁹¹ Mirfield, 1985, p.50.

sentimentalism held towards defendants.⁹² In support of his proposition Wigmore refers to decisions he considered "almost incredible". Without stating the source of the authorities, he argues that these decisions meant that:

a confession could be excluded because it was made upon a promise to give a glass of gin; because the prosecutor said "if the prisoner would only give him his money, he might go to the devil if he pleased"; because a handbill, offering a few pounds' reward for evidence, was posted in the magistrate's office; because the prisoner was told that "what he said would be used against him".⁹³

Wigmore felt that the absurdities of the results reached in these decisions "disfigured the law of the admissibility of confessions."⁹⁴ However, a wider, less selective examination of the case law from the period under consideration reveals a number of inconsistent and contradictory rulings by individual and semi-autonomous judges - rather than a simple lineal predilection on the part of a corporate or collaborative body of judges to exclude confession evidence upon insubstantial grounds.

The case concerning the promise of gin, for instance, was decided in the early part of the nineteenth century.⁹⁵ The accused, Sexton, suspected of burglary, had told the constable who had charge of him that he was prepared to reveal his part in the offence if given a glass of gin. He was given *two* glasses of gin after which he made a confession. Best, J refused to receive the confession in evidence since it had been "very improperly obtained by the officer". He added that police officers "must not be permitted to tamper with prisoners to induce them to make confessions."⁹⁶ Furthermore, in anticipating the role the formal caution was later to serve in the context of fostering voluntary confessions, the judge suggested that:

Had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner that what he had already said could not be given in evidence against him; and it was for him to consider whether he would make a second confession.⁹⁷

⁹² See 3 Wigmore, 1970, p.298.

⁹³ *Ibid.*, p.297.

⁹⁴ *Ibid.*, p.298.

⁹⁵ The case of *Sexton*, decided in 1823, is reported in Burn (1823) *The Justice of the Peace and Parish Officer*, in the section entitled *Chewynd's Supplement*, at pp.103-4.

⁹⁶ *Ibid.*, p.103.

⁹⁷ *Ibid.*

The judge argued that as the prisoner had not been so cautioned he might have signed the confession before the magistrate under the impression "that he could not make his case worse than he had already made it." Turning to the conduct of the police officer, Best, J then stated:

If a confession so obtained were allowed to be proved at the trial of the prisoner, however careful a magistrate might be that a prisoner should not be entrapped into a confession, an over zealous constable might defeat the humane provisions of the law, by so practising on the hopes and fears of the prisoner ... to make him, when before the magistrate, appear to make an uninfluenced and voluntary confess[or], when every sort of trick had been made use of. I will not on this ground allow this confession to be read ... and I hope that I shall not find a police officer again employed in preparing, either the depositions of witnesses or the confessions of prisoners.⁹⁸

Best, J was here concerned not only with the voluntariness of the confession being impaired by the inducements of threats or of promises but also - under a wider aspect of the voluntariness requirement than advocated by Wigmore⁹⁹ - to regulate the investigative conduct of police officers where it encroached upon the protections the courts afforded suspected persons. Evidently, the judge did not trust the police to abstain from exceeding their duties by exercising the hopes and fears of either prisoners or witnesses. Contrary to the assumption that the first half of the nineteenth century was a period of sentimental excess,¹⁰⁰ throughout the whole of the nineteenth century the voluntariness rule was extended by individual judges to address the treatment of the accused before trial either at the hands of the magistrates or, as the century progressed, of the "new" police. Many of the nineteenth century authorities covering the admissibility of confession evidence, therefore, reveal an inter-judicial dialogue which concerned the proficiency and capacity of the exclusionary rule to govern the conduct of criminal investigations.

In the 1817 case of *Wilson*,¹⁰¹ an accomplice gave evidence against the defendant. The prosecution produced the examination of the accused, taken before the committing

⁹⁸ *Ibid.*, pp.103-4.

⁹⁹ It has been suggested that Wigmore, "being totally committed to an unreliability basis for the exclusionary rule," could not support any judicial decision that excluded evidence in order to discourage improper police methods. (Mirfield, 1985, p.52.)

¹⁰⁰ 3 Wigmore, 1970, pp.298-301.

¹⁰¹ *Wilson* (1817) Holt. 597.

magistrate, to confirm the testimony of the accomplice. Giving evidence, the magistrate stated that while he had examined the accused "at a considerable extent, in the same manner as he was accustomed to examine a witness" he nonetheless "held out no hopes or inducement to the prisoner, employed no threats," and had not put the prisoner on oath. Richards, LCB, in refusing to permit the examination to be read in evidence, said:

No matter whether a prisoner be sworn or not. An examination of itself imposes an obligation to speak the truth. If a prisoner will confess, let him do so voluntarily.¹⁰²

Here the judge utilized the voluntariness rule to govern admissibility and implied that the right of the prisoner not to answer judicial interrogatories must be respected and protected at the pre-trial phase of the prosecution process if it is not to be undermined. Although the decision was overruled in 1826,¹⁰³ it demonstrates that when the voluntariness requirement was given a wide construction it was not done so, as Wigmore suggests, on pretexts that were "trivial and irrational".¹⁰⁴ Rather the broad interpretation was used as a means to control the extra-judicial investigative process and to ensure that confessions were not obtained under the inherently coercive pressures of interrogatories carried out by those having authority over the liberty of the suspect. This would indicate that some judges were prepared to consider the force of other pressures beyond specific threats or promises that may induce an involuntary confession.¹⁰⁵

The 1824 case of *Thornton*¹⁰⁶ constitutes a direct challenge to the thesis advanced by Wigmore. Thornton, a boy of fourteen, had been apprehended and detained in police custody without food or water. After some five hours he confessed. At trial, the presiding judge admitted the confession but sought the opinion of the Judges as to "whether a confession so obtained, when the detention of the prisoner was perhaps illegal, and when the conduct of the officer was calculated to intimidate, was admissible in evidence."¹⁰⁷ The Judges, by a majority of seven, with three dissenting, held the confession to have been

¹⁰² *Ibid.*

¹⁰³ *Ellis* (1826) Ry. & M. 432.

¹⁰⁴ 3 Wigmore, 1970, p.299.

¹⁰⁵ See, for example, *Enoch and Pulley* (1835) 5 C.& P. 538; and *Croyden* (1846) 2 Cox C.C. 67.

¹⁰⁶ *Thornton* (1824) 1 Moo. 27.

¹⁰⁷ *Ibid.*, p.28.

"rightly received, on the ground that no threat or promise had been used."¹⁰⁸ The Judges are not reported as having based their conclusions directly on the reliability of a confession obtained in this manner. Here the voluntariness rule was given a restrictive interpretation in what is said to have been the period of "sentimental excess".¹⁰⁹

Other authorities that appear to contradict the "period of sentimental irrationality" thesis include the case of *Lloyd*.¹¹⁰ The accused and his wife were detained in police custody, in separate rooms, charged with receiving stolen property. Lloyd was told by a constable "[I]f you tell where the property is; you shall see your wife." The evidence of what the prisoner had said in response to this incentive was received in evidence.

In *Spilsbury*¹¹¹ a prisoner made a statement to the constable who had him in custody. However, the prisoner "was drunk at the time; and it was imputed that the constable had given him liquor to cause him to be so." Coleridge, J, placing a narrow construction upon the evidential requirement that a confession be free and voluntary expression of guilt, found that the statement the prisoner made was admissible in evidence against him. He stated that "to render a confession inadmissible, it must either be obtained by hope or fear."¹¹²

These and other such cases¹¹³ suggest that some judges adopted a restrictive interpretation of the exclusionary rule, basing their reception of incriminatory statements on the ground that only the hope of promises or the fear of threats could, but would not invariably, disable the reliability of a confession. These authorities, nonetheless, effectively undermine the proposition that the attitude of judges towards confessions was one of a general suspicion that articulated itself in a prejudice against the admission in evidence of all confessions.¹¹⁴ It is, therefore, misleading to assume that the law governing the admissibility of confessions in the first half of the nineteenth century had become

¹⁰⁸ *Ibid.*

¹⁰⁹ See 3 Wigmore, 1970, pp.298-308; Mirfield, 1985, pp.50-3.

¹¹⁰ *Lloyd* (1834) 6 Car. & P. 398.

¹¹¹ *Spilsbury* (1835) 7 Car. & P. 187.

¹¹² *Ibid.*, p.188.

¹¹³ See for example *Richards* (1852) Car. & P. 318, and compare *Doherty* (1784) 13 Cox. C.C. 23. See also *Long* (1833) 6 Car. & P 179; *Thomas* (1836) 7 Car. & P. 345; *Court* (1836) 7 Car. & P. 487; *Sleeman* (1853) 6 Cox. C.C. 245.

¹¹⁴ See Wigmore, 1970, p.297.

"very rigid and unable to adapt to the circumstances of the individual case"¹¹⁵ and to suggest that this supposed inflexibility meant that:

It became settled that any statement to the accused to the effect that he had better confess or that it would be better for him to confess would render his confession inadmissible.¹¹⁶

Wigmore reasons that this "unnatural development" was a product of "absurd and dangerous sentimentalities" which inclined judges - in view of the unfairness of a criminal justice system that had rendered the accused incompetent to testify and denied him the assistance of counsel - to exclude confessions and disfigure the law.¹¹⁷ The force of this reasoning is, however, diluted by the observation that a practice of permitting the accused to make his defence through counsel began to emerge almost a century before the Prisoners' Counsel Act of 1836.¹¹⁸ In respect of the testimonial incompetency of accused persons, the prolonged debate that preceded the Criminal Evidence Act of 1898, suggests that much legal opinion considered the inability of defendants to make their own defence a distinct advantage to the delivery of an effective defence through the mediation of counsel.¹¹⁹ Furthermore, the cases in which judges ruled in favour of excluding confessions tended to be based not upon judicial sentimentalities but rather upon legalistic applications of the exclusionary rule. These rulings indicate a judicial assessment of the probative value of extra-judicial statements obtained from suspects under conditions that might weaken the authenticity of confessions presumed to be spontaneous, unreserved and voluntary avowals of guilt made willingly by free-acting individuals unbidden by either physical or mental inducements. It was the exclusionary rule, rather than any fixed irrational judicial sentiment, that was employed by some judges who, throughout the nineteenth century, seem to have considered that the nature of the prosecution process - whether as a result of the unsupervised practices of prosecuting agents or of the pressures inherent in criminal investigations - could of itself actuate involuntary and unreliable confessions from citizens who were to be afforded the right not to be compelled to

¹¹⁵ Mirfield, 1985, p.51. See also 1 Stephen, 1883, p.447.

¹¹⁶ Mirfield, 1985, p.51.

¹¹⁷ 3 Wigmore, 1970, pp.298-301; see also MacDonald and Hart, 1947, pp.824-28; Kaufman, 1979, pp.20-21.

¹¹⁸ 6, 7 Will.4, c.114 (1836). See 1 Stephen, 1883, p.424; Langbein, 1978, pp.307-16; Beattie, 1986, pp.356-62.

¹¹⁹ See Noble, 1970, pp.249-66; Parker, 1984, pp.156-75.

incriminate themselves. The nineteenth century authorities, therefore, betray conflicting judicial views as to the precise meaning and application of the voluntariness test.

The case of *Swatkins*¹²⁰ is, in this regard, consistent with the preceding authorities. The accused was charged with setting fire to a stack of barley. A constable, called to prove the confession made to him, stated that he found the prisoner in the custody of another constable who immediately left the room whereupon the prisoner made his incriminatory statement. It was objected that the first constable, who did not appear as a witness, may have induced the prisoner to confess, leaving the second constable to receive the involuntary confession. Patterson, J said that "as the witness did not caution the prisoner not to confess, it would be unsafe to receive such evidence. It would lead to collusion between constables."¹²¹ Here the judge utilized the voluntariness requirement as laid down by the court in *Warickshall* to exclude evidence that appeared in so questionable a shape that when considered as evidence of guilt no credit could be given to it.¹²² In doing so Patterson, J implied that the requirement was not circumscribed by narrow conceptions of the effect of specific threats or promises.

The judgment suggests a judicial preparedness to incorporate a "disciplinary principle" within the voluntariness test, to discourage future improper activities on the part of investigative and prosecutorial agents by excluding evidence tainted by pre-trial improprieties. Thus, suspected offenders should be informed or cautioned that as in open court, so in criminal investigations, they are not obliged to respond to pressures which might work to compel them to incriminate themselves. Investigative agents ought not to invite incriminatory admissions, irrespective of the reliability of those admissions, from suspects who have not been so informed since some judges would not consider evidence elicited in such a manner to be free and voluntary.

Judicial concern with investigative practices, therefore, came to be expressed, by some individual judges, through a broad interpretation of the voluntariness test which was exercised in an effort to govern the prosecution process through the exclusion of improperly obtained confession evidence. The development of the "person in authority requirement"¹²³ and the caution requirement constitute crucial aspects of this judicial concern since they operated to minimise any extra-judicial recourse to the inducements of

¹²⁰ *Swatkins* (1831) 4 Car. & P. 548.

¹²¹ *Ibid.*, pp.549-50.

¹²² *Warickshall* (1783) 1 Leach. 263, p.264.

¹²³ See *Kingston* (1830) 4 Car. & P. 387; *Dunn* (1831) 4 Car. & P. 543; *Slaughter* (1831) 4 Car. & P. 544; *Thomas* (1834) 6 Car. & P. 353; see also Mirfield, 1981, pp.92-103.

fear and hope being held out over suspects to cause them to make involuntary confessions. These requirements also worked to legitimate confessions that were viewed by judges as being free and voluntary avowals of guilt and therefore receivable in evidence. However, as a fixed meaning eluded the concept of voluntariness as it related to the exclusionary rule, some judges seemed more prepared than others to give it an extended meaning;¹²⁴ while others, according the rule a narrow interpretation, tended to admit the evidence but, while doing so, were frequently critical of the investigative methods - including the extra-judicial interrogation of suspects - that were employed.¹²⁵

Judicial concern for the largely unsupervised and unregulated extra-judicial questioning of suspects - particularly those not authorised by the Marian legislation - is evident in the case of *Wild*¹²⁶ where the majority of the Judges, with four dissenting, found a confession elicited by questions put to the prisoner by "several neighbours, but no constable, "to be strictly admissible" as there was no evidence of threats or promises. Significantly, however, the judges went on to say that "they much disapproved of the mode in which it was obtained."¹²⁷ Similar concerns had brought forth from judges exhortations advocating the employment of a caution to be issued, originally by examining magistrates, to safeguard the voluntariness of confession evidence. In the words of Gurney, B:

A prisoner ought to be told that his confessing will not operate at all in his favour; and that he must not expect any favour because he makes a confession; and if anyone has told him that it will be better for him to confess, or worse for him if he does not, he must pay no attention to it; and that anything he says to criminate himself will be used as evidence against him on his trial. After that admonition, it ought to be left entirely to himself whether he will make any statement or not: but he ought not to be dissuaded from making a perfectly voluntary confession, because that is shutting up one of the sources of justice.¹²⁸

This direction was aimed primarily at the preliminary examination of suspects by the magistrate though it became equally applicable to the interrogation of suspects conducted by the "new" police to legitimate their inquisitional practices. However, there seems to

¹²⁴ See *Kingston* (1830) 4 Car. & P. 387; *Dunn* (1831) 4 Car. & P. 543; *Slaughter* (1831) 4 Car. & P. 544; *Shephard* (1836) 7 Car. & P. 579.

¹²⁵ See, for example, *Kerr* (1837) 8 Car. & P. 177.

¹²⁶ *Wild* (1835) 1 Moo. 452.

¹²⁷ *Ibid.*, p.455.

¹²⁸ *Green* (1832) 5 Car. & P. 312.

have been a wide variety of divergent practice as to the form the caution should take. Denman LCJ, in the case of *Arnold*¹²⁹ decided in 1838, sought to establish what he considered to be "the proper course of proceeding" when he ruled:

A prisoner is not to be entrapped into making any statement; but, when a prisoner is willing to make a statement, it is the duty of magistrates to receive it; but magistrates before they do so ought entirely to get rid of any impression that may have been of the prisoner's mind, that one statement may be used for his own benefit; and the prisoner ought to be told that what he thinks fit to say will be taken down, and may be used against him on his trial.¹³⁰

This statement replicates that made six years earlier in *Green*¹³¹ by Gurney, B. Both suggest that a confession made following a caution designed to diminish, or indeed eliminate, the action on the mind of the accused of possible inducements, by way of threats or promises, will be receivable in evidence as a voluntary averment of guilt. This would seem to illustrate that the concept of voluntariness, however nebulous, had become essential to the validation of convictions based on confessions. The judicial requirement of a caution also served to legitimate "acceptable" investigative practices and facilitated the acquisition of "voluntary" incriminatory admissions as admissible evidence which was "presumed to flow from the strongest sense of guilt" and therefore was "deserving of the highest credit."¹³²

It is noteworthy, however, that Gurney, B argued that the caution should inform the accused that any incriminatory admissions *will* be used in evidence, while Denman, LCJ contended that a caution ought to make clear that such admissions *may* be used against its author. The significance of this in the context of investigations conducted by law enforcement officers was acknowledged by some judges who felt that the use of the imperative *will* could convey to the mind of the prisoner that his answers, whether exculpatory or incriminatory, would ineluctably be admitted in evidence, effectively placing the suspect under an obligation to make a statement. It was argued, in this instance by Coleridge, J that cautioning a suspect to the effect that his answers would be used in his favour amounted to a "direct inducement to a man to make a confession",¹³³ since such a

¹²⁹ *Arnold* (1838) 8 Car. & P. 621.

¹³⁰ *Ibid.*, p.622.

¹³¹ *Green* (1832) 5 Car. & P. 312.

¹³² *Warickshall* (1783) 1 Leach. 263, p.264.

¹³³ *Per* Coleridge, J in *Drew* (1838) 8 Car. & P. 140.

caution was likely to operate on the mind of the suspect to create "a hope that if he told his story, whether true or false, it might benefit him."¹³⁴ The judge made a similar observation in the case of *Morton*¹³⁵ in regard to a caution issued by a constable who had apprehended the accused. The constable had told his prisoner that "anything you can say in your defence we shall be ready to hear, or send to assist you." The statement made by the prisoner in consequence of this caution was excluded by the judge who found that such words were "likely to produce an improper effect" on the mind of the prisoner. "Before such evidence can be received" the judge continued, "it must be seen that the prisoner's mind is free from any false hope or fear." The judge was not only concerned that the caution should not of itself act as an inducement for the prisoner to make a statement - which, again, could work to undermine the right of the accused not to respond to questions inviting incriminatory replies - he was also attentive to the key role the "new" police were increasingly acquiring in the prosecution process. In reprimanding the constable the judge also remarked:

the law will not sanction this sort of balancing the one influence with another. The prisoner's mind must be left entirely free.... It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses, whether for or against himself, provided no improper influence be used. But when a man interferes who has no such duty, and used [sic] language tending improperly to influence the prisoner's mind, the statement cannot be received.¹³⁶

The absence of a "proper caution" capable of eliminating the effects of possible inducements to answer extra-judicial interrogatories - thereby rendering subsequently made statements unreliable - became a primary ground upon which some judges excluded confession evidence. This action on the part of individual judges, rather than resulting from any supposed sentiment in favour of accused persons,¹³⁷ seems to have been an uncoordinated judicial attempt to employ the voluntariness requirement as a check upon the extra-judicial excesses of magistrates and police officers.

Furley,¹³⁸ decided in 1844, is an illustration of this approach. Before making her confession, Furley had been cautioned by the arresting police officer that "whatever she

¹³⁴ *Morton* (1843) 2 M. & Rob. 514, p.515.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ See 3 Wigmore, 1970, p.297; MacDonald and Hart, 1947, p.826; Mirfield, 1985, pp.50-3.

¹³⁸ *Furley* (1844) 1 Cox. C.C. 76.

told him would be used against her at her trial." Maul, J, referring to the judgment in *Drew*¹³⁹ which he said he had followed several times,¹⁴⁰ declined to accept the statement on the ground that:

If you promise a person that what he states will be at all times used at the trial, you may thereby be inducing him to confess. But you are guilty of a misrepresentation in saying so.... You are giving a positive undertaking to do that which may not after all be done. The proper course is, where any caution at all is given, to let the prisoner know that what he says may do him harm, but cannot possibly do him good.¹⁴¹

Thus the reliability of an induced confession was to be made subordinate to the primary consideration: the conduct of law enforcement officials in respect of the judge-made provisions designed to facilitate and authenticate pre-trial "voluntary" confessions.

Conclusion

A review of the relevant case law suggests that legal historians such as Wigmore,¹⁴² and more recently Kaufman¹⁴³ and Mirfield,¹⁴⁴ misunderstand or misrepresent judicial attitudes of the first half of the nineteenth century towards confessions as founded on sentimental excess. The decisions of the period point to a legalistic implementation of the exclusionary rule grounded on conceptions of the voluntariness principle as understood by individual, relatively autonomous, judges and as ratified by their insistence that suspects be properly cautioned. This worked to generate a number of conflicting rulings, some of which decided in favour of the admission of incriminatory statements in evidence, placing a narrow construction on the requirement of voluntariness.¹⁴⁵ In other cases - in substantially

¹³⁹ *Supra.*, n.133.

¹⁴⁰ An example being *Harris* (1844) 1 Cox. C.C. 106.

¹⁴¹ *Furley* (1844) 1 Cox. C.C. 76, p.77.

¹⁴² 3 Wigmore, 1970, pp.297-301.

¹⁴³ Kaufman, 1979, pp.20-21.

¹⁴⁴ Mirfield, 1985, pp.50-3.

¹⁴⁵ See for example *Lambe* (1791) 2 Leach. 552; *Thornton* (1824) 1 Moo. 27; *Richards* (1832) 5 Car. & P. 318; *Long* (1833) 6 Car. & P. 179; *Lloyd* (1834) 6 Car. & P. 393; *Spilsbury* (1835) 7 Car. & P. 187; *Wild*

similar circumstances and often involving a judge that had shown an inclination to receive similar evidence - they rejected them under an extended interpretation of the voluntariness test.¹⁴⁶

These conflicting authorities, therefore, militate against the assumption that judges, in the period between 1800 and 1852, uniformly engaged in a "habit of seizing upon the slightest pretext in order to exclude a confession".¹⁴⁷ Moreover, the relevant nineteenth century authorities do not appear to support the argument, made by Wigmore, that the circumstances attending the arrest and detention of suspects and the possibility that a confession was involuntarily made in answer to self-incriminatory questions, were not bases upon which judges invoked the exclusionary rule.¹⁴⁸ In short, the authorities indicate that there was not a marked or collective shift in judicial opinion mid-way through the century away from an interpretation of the evidential requirement of voluntariness that was unduly favourable to accused persons. Indeed, the case law discussed in the next chapter suggests that judicial attitudes regarding both extra-judicial confessions and the role played by the "new" police in their acquisition remained, to a great extent, inconsistent throughout the nineteenth century and the early years of the twentieth century.

(1835) 1 Moo. 452; *Thomas* (1836) 7 Car. & P. 345; *Court* (1836) 7 Car. & P. 487; *Kerr* (1837) 8 Car. & P. 177.

¹⁴⁶ See for example *Thompson* (1783) 1 Leach. 291; *Cass* (1784) 1 Leach. 293; *Wilson* (1817) Holt. 597; *Sexton* (1823) *supra.*, n.95; *Kingston* (1830) 4 Car. & P. 387; *Dunn* (1831) 4 Car. & P. 543; *Slaughter* (1831) 4 Car. & P. 544; *Shephard* (1836) 7 Car & P. 579.

¹⁴⁷ Kaufman, 1979, p.21.

¹⁴⁸ 3 Wigmore, 1970, p.502.

5

THE EXCLUSIONARY RULE IN THE PROSECUTION PROCESS OF THE SECOND HALF OF THE NINETEENTH CENTURY

The 1852 case of *Baldry*¹ is generally regarded as marking the end of the period of judicial "sentimental excess" and the point at which the courts curtailed or corrected a supposed trend in favour of the exclusion of confession evidence.² Again, however, a close examination of the prevailing criminal process suggests a more problematic picture. This picture is influenced by the consideration that by the mid-nineteenth century various features of the evolving investigative and prosecution process stood out in profound contrast with that which had been routinized under the Marian legislation of the mid-sixteenth century.³ Chief amongst these features was the emergence and institutionalisation of professional police forces.

The "New" Police in the Nineteenth-Century Prosecution Process

The period in which modern forms of policing emerged may be dated from the 1829 Metropolitan Police Act,⁴ which introduced the "new" police, to the 1856 County and Borough Police Act,⁵ which obliged all local authorities to set up and maintain "new" police forces on the Metropolitan Police model. Together, these major Acts marked the unprecedented formation and spread throughout England and Wales of unified, bureaucratic, semi-military bodies, employing full-time, uniformed civilians for the prevention and detection of crime.⁶ Under the measures that appeared between these

¹ *Baldry* (1852) 2 Den. 430.

² 1 Stephen, 1883, p.447; 3 Wigmore, 1970, p.298; Kaufman, 1979, p.21; MacDonald and Hart, 1949, p.826; see also Mirfield, 1985, pp.50-6.

³ 1 & 2 Phil. and Mar. c.13 (1554); 2 & 3 Phil. and Mar. c.10 (1555).

⁴ 10 Geo. 5, c.94.

⁵ 19 & 20 Vict., c.69.

⁶ See Miller, 1977, p.2; Cornish, 1978a, pp.305, 308, 314; Jefferson and Grimshaw, 1984, p.28; Emsley, 1987, p.171; Hay and Snyder, 1989, pp.4-5.

dates⁷ the "new" police gradually displaced the traditional modes of policing and prosecution which were largely victim-based, reactive and heavily dependent upon parish constables, watchmen, private associations, thief-takers and the investigative-prosecutorial powers of magistrates.⁸

As a centrally directed and regionally-stationed institution,⁹ specifically designed to occupy a social space "midway between an outside military force and the group of people to be controlled",¹⁰ the "new" police - in their policing of the lower orders, who were being disciplined in the developing modes of production necessitated by industrial capitalism - worked in the social and crime control interests of the governing classes.¹¹ Indeed, during the course of the first half of the nineteenth century, the police came to acquire a key role in the maintenance of stable capitalistic social relations.¹²

At the outset the architects of the "new" police had placed emphasis upon preventive policing of a pro-active, rather than reactive nature. Instead of conducting detective investigations into offences after the fact, the police were to prevent crime primarily through a system of surveillance and highly visible patrols.¹³ In practice, however, this conception of policing¹⁴ began to erode as the "new" police assimilated and utilised powers not only to arrest and detain suspects, to privately interrogate and take

⁷ For a discussion of the series of legislative measures that appeared between 1829 and 1856 providing for the creation of "new" police forces, see Lee, 1901, pp.262-308; 14 Holdsworth, 1964, pp.208-9, 235; Hart, 1978, pp.181-200; Jefferson and Grimshaw, 1984, pp.28-34; Cornish and Clark, 1989, pp.587-95.

⁸ See Miller, 1977, pp.74, 82; Cornish, 1978a, pp.305-6, 308; Emsley, 1987, pp.148-50; Cornish and Clark, 1989, pp.551-7; Hay and Snyder, 1989, p.5. The condemnation of pre-industrial forms of policing - as uncoordinated, corrupt, inadequate and ineffectual - not only contributed to the development of professional policing it also helped to legitimate it. See 10 Holdsworth, 1938, pp.143-6; Phillips, 1977, p.61; Bunyan, 1977, pp.58-60; Ascoli, 1979, pp. 93-5; Brogden, 1982, pp.52-6; Reiner, 1985, pp.10-11, 22-3, 27-8; Peters, 1985, p.110; Emsley, 1987, pp.171, 174; Cornish and Clark, 1989, pp.552, 554-5; Hay and Snyder, 1989, pp.5-9, 15, 37; Emsley, 1991, pp.56-61.

⁹ 14 Holdsworth, 1964, p.94; Gatrell, 1990, pp.260-2.

¹⁰ Monkkonen, 1981, p.39. See also Gatrell, 1990, pp.249-61, 266-7, 277-9.

¹¹ Silver, 1967, pp.3-5, 7-15, 20-2; Storch, 1975, p.61-90; Storch, 1976, pp.481-509; Bunyan, 1977, pp.63-4, 66; Miller, 1977, pp.5-10, 106-11; Cohen, P., 1979, pp.120-8.

¹² Miller, 1977, pp. 104-39; Brogden, 1982, pp.49-71, 184; Hay and Snyder, 1989, p.8; Gatrell, 1990, pp.260-2.

¹³ See Bunyard, 1978, p.10; Stead, 1985, p.51; Scruton, 1985, p.20; Reiner, 1985, pp.14, 58-9; Emsley, 1991, p.24; Weinberger, 1991, pp.78-9.

¹⁴ A conception that served to legitimate the notion that the police were no more than citizens in uniform and as such equally subject to the rule of law. See Lee, 1901, pp.214, 228-32, 240-1; Miller, 1977, pp. 15-6, 47; Monkkonen, 1981, p.39; Reiner, 1985, pp.53-4; Hay and Snyder, 1989, p.39; Gatrell, 1990, p.274.

incriminatory statements from them, but also to institute criminal proceedings against them.¹⁵ Indeed, by as early as the middle of the century the police had become "convenient substitutes for private prosecutors".¹⁶

The emergence of the "new" police as an unparalleled organ of inquiry not only added a novel official dimension to the prosecution process it also contributed to the gradual shift away from Marian-style preliminary examinations before justices toward an increasingly open quasi-judicial inquiry into cases prepared for prosecution.¹⁷ Midway through the nineteenth century this shift found statutory expression in the 1848 Indictable Offences Act.¹⁸

The Act, which was designed to codify prevailing practice,¹⁹ formally empowered justices to hear the case being prepared for trial by the prosecution²⁰ and, after being satisfied of *prima facie* case, to commit the accused for trial. Should the prosecution fail to so satisfy the justices, the accused was to be discharged.²¹ The legislation also gave justices powers to compel witnesses for the prosecution to attend and give evidence at preliminary examinations,²² and provided both for the accused to be present at such examinations and for him to put questions to witnesses produced against him.²³ Finally, the statute imposed a formal duty on justices, following the examination of prosecution witnesses, firstly, to caution the accused that he was not obliged to answer the charge and, secondly, to give the accused to understand "that he has nothing to hope from any promise

¹⁵ See Miller, 1977, pp.74-5; Cornish, 1978b, p.60.

¹⁶ Hay and Snyder, 1989, p.37. See also Miller, 1977, pp.74, 82, 84-5, 107-8.

¹⁷ See Freestone and Richardson, 1980, pp.9-16; Cornish, 1978b, pp.60-1.

¹⁸ 11 & 12 Vict., c.42 (1848). This was one four Acts collectively known as Jervis' Acts after the then Attorney-General, Sir John Jervis (1802-56). The remaining Acts were: 11 & 12 Vict., cc.43, 44 (1848); 12 & 13 Vict., c.18 (1849).

¹⁹ *Parliamentary Debates* (Commons), vol.96 col.6; Osborne, 1960, pp.224, 226; Freestone and Richardson, 1980, pp.10-16; Cornish, 1978a, pp.310-11.

²⁰ According to 11 & 12 Vict., c.43, s.12: "the room or place in which justices shall sit to hear any complaint or information shall be deemed an open and public place to which the public generally may have access". This, in the view of Osborne (1960, p.226), was a revolutionary development; one that made clear that justice was not to be secured behind "the closed doors of a Justice's parlour".

²¹ 11 & 12 Vict., c.42, s.25.

²² *Ibid.*, ss.9, 16.

²³ *Ibid.*, s.17. By s.27 he also became entitled to copies of the committal papers.

of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt".²⁴

Thus, by the middle of the nineteenth century, with the effective judicialisation of the justices, the active investigation and prosecution of crime passed to the "new" police forces²⁵ and while statute governed the taking of statements from suspects by justices, it was left to the courts²⁶ to develop rules which would control and ultimately legitimate the extra-judicial questioning of suspects by the police.

Voluntariness and Police Questioning

At the outset the caution required by the 1848 Act²⁷ was considered to be a condition precedent to the admission of confession evidence.²⁸ In the case of *Pettit*²⁹ the prisoner was apprehended on a charge of murder and brought before magistrates who questioned the prisoner. The record of the examination was not signed either by a magistrate or the prisoner. It was argued for the prisoner that the "magistrate had no right, under any circumstances, to put questions to a prisoner." It was further contended that the position of authority enjoyed by magistrates would of itself necessarily exercise undue force over prisoners to compel them to answer and, therefore, render their statements involuntary and inadmissible. Finally, the trial judge was invited to rule the record of the examination inadmissible on the basis that the prisoner had not been cautioned in accordance with the Act of 1848. Wild, CJ, without explicitly referring to the requirement of a caution, rejecting the evidence "upon the general ground that magistrates have no right to put questions to a prisoner with reference to any matters having bearing upon the charge upon which he is brought before them."³⁰ In short, the judge confirmed that the 1848 caution limited the role of magistrates to inviting the suspect to respond, if he so elects, to the case

²⁴ *Ibid.*, s.18.

²⁵ Cornish, 1978b, p.60.

²⁶ *Ibid.*, p.61.

²⁷ Indictable Offences Act, 11 & 12 Vict., c.42 (1848) s.18.

²⁸ See *Kimber* (1849) 3 Cox. C.C. 223; *Higson* (1849) 2 C. & K. 769; compare *Samsome* (1850) 4 Cox. C.C. 203.

²⁹ *Pettit* (1850) 4 Cox. C.C. 164.

³⁰ *Ibid.*, p.165.

presented against him at his preliminary examination. Presumptively innocent suspects should be left free to exercise their right to remain silent and oblige the state - should the magistrates accept that a *prima facie* case has been established - to prove its case before judge and jury at trial where the defendant, according to the rhetoric of the law, is again to be presumed innocent. Wild, CJ - presumably mindful of the historical source of the voluntariness test as a core aspect of the privilege against compulsory self-incrimination - also made the following remark:

The law is so cautious in guarding against anything like torture that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry.³¹

The caution, therefore, embodied the requirement of voluntariness which operated to validate admissible confessions even though, as the authorities reveal, considerable doubt remained as to its precise meaning and applicability.

The case of *Baldry*,³² it has been argued, brought to an end the trend of the first half of the nineteenth century which was "completely in favour of the accused."³³ It is also widely seen as the decision that stemmed the high tide of judicial sentiment in favour of the exclusion of incriminatory admissions made extra-judicially by accused persons.³⁴

The accused in *Baldry* was indicted for administering poison with intent to murder. It appeared in evidence that the constable who had apprehended the prisoner informed him that he need not say anything to incriminate himself but "what he did say would be taken down and used as evidence against him." Thereupon, the prisoner made an immediate confession. The first instance judge, Campbell, LCJ, admitted the evidence as a voluntary confession of guilt even though the caution given by the constable differed from that directed by s.18 of the 1848 Act in that the constable had suggested that the accused *would* rather than *might* be prosecuted. The judge thought that this departure from the Act did not operate as a promise or threat to induce the prisoner either to confess or to say anything untrue. However, on the ground that doubts had been entertained by judges as to the admissibility of confessions obtained after similarly worded cautions, Campbell, LCJ reserved the question for the Court for Crown Cases Reserved, which had been formally

³¹ *Ibid.*

³² *Baldry* (1852) 2 Den. 430.

³³ Kaufman, 1979, p.20.

³⁴ MacDonald and Hart, 1947, pp.826-27.

established in 1848.³⁵ The Court, comprising five judges, unanimously affirmed the decision of Campbell, LCJ.

Certain dicta from the case are often referred to as evidence of the desire of judges to return to the orthodox or narrow voluntariness test for the exclusion of confession evidence.³⁶ That test, according to Wigmore, was to ask whether the inducements, if any, were of themselves capable, in the specific circumstances, of producing a false or unreliable confession.³⁷ While it has not been demonstrated that a single or orthodox test of voluntariness had ever prevailed in the nineteenth century, dicta from the decision lends support to the view that the court was concerned to rationalise the disparate precedents and establish a more attenuated interpretation of what may constitute an inducement having the capacity to render a confession involuntary and inadmissible. For example, Park, B thought that the authorities exhibited "too much tenderness towards prisoners in this matter". He went on to confess that he could not "look at the decisions without some shame" when he considered "what objections have prevailed to prevent the reception of confessions in evidence". He felt that the exclusionary rule had "been extended quite too far, and that justice and common sense [had], too frequently, been sacrificed at the shrine of mercy."³⁸ For Erle, J confessions were "the best evidence that can be produced" and the "many cases where confessions have been excluded, justice and common sense [had] been sacrificed, not at the shrine of mercy, but at the shrine of guilt."³⁹

Other less frequently cited dicta from the case, when considered in light of the observations of Park, B and Erle, J, indicate a degree of ambivalence in the attitude of the Court in respect of the operation of the exclusionary rule, the caution and therefore, the legitimate practices of law enforcement officers. Campbell, LCJ stressed "that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded."⁴⁰ He also pointed out that "[p]risoners are not to be interrogated. By the law of Scotland they may be; but by the law of England they cannot."⁴¹ Park, B confirmed that in order to render a confession admissible in evidence it must be "perfectly voluntary". He

³⁵ 11 & 12 Vict., c.78 (1848).

³⁶ See, for example, Mirfield, 1985, p.54.

³⁷ 3 Wigmore, 1970, pp.497-98.

³⁸ *Baldry* (1852) 2 Den. 430, p.445.

³⁹ *Ibid.*, p.446.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, p.442.

was in "no doubt that any inducement in the nature of a promise or threat held out by a person in authority, vitiates a [voluntary] confession".⁴² Finally, Pollock, CB argued that it should be "left to the prisoner a matter of perfect indifference whether he should open his mouth or not."⁴³

The Court, therefore, was not concerned simply to restrict too broad an interpretation of the voluntariness rule that had characterised some of the authorities. The Court also seems to have been anxious to arrest what it appears to have perceived as a recent trend, exhibited by some individual and largely independent judges of the lower courts, to project too stringent a construction of the voluntariness test onto the required caution.⁴⁴ In this respect the Court expressed its difficulty in appreciating "how it could be argued that any advantage is offered to a prisoner by being told that what he says will be used in evidence against him."⁴⁵ However, the Court also confirmed that a caution was required to remind the suspect "that he need not say anything, but if he says anything let it be true".⁴⁶

Thus a close examination of the decision in *Baldry* reveals that far from propounding an unambiguous direction to the lower courts intended to restrict the scope of the exclusionary rule and to prevent "almost anything being treated as an inducement to confess",⁴⁷ the Court reaffirmed the status and validity of both the voluntariness test and the attendant caution requirement. The decision of the Court, therefore, can be seen as an attempt on the part of a convocation of senior judges to provide guidance both to the lower courts and lesser law enforcement officials - mainly magistrates but by dint of practice also to police officers - in respect of the acquisition and reception in evidence of "voluntary" avowals of guilt.

Essentially, *Baldry* stands as an authority for the contention that while law enforcement officers were statutorily obliged to caution suspects not to incriminate themselves,⁴⁸ the words of the caution should not be "tortured" by judges in their assessment of its effects as a possible inducement upon the mind of the accused. The caution should be taken at its "natural" and "obvious" meaning. So that while "[i]t is proper that a prisoner should be

⁴² *Ibid.*, pp.444-5.

⁴³ *Ibid.*, p.442.

⁴⁴ See *ibid.*, p.445, *per* Park, B.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, p.442, *per* Pollock, CB.

⁴⁷ 1 Stephen, 1883, p.447.

⁴⁸ 11 & 12 Vict. c.42 (1848) s.18.

cautioned", what that prisoner might say following the caution "ought to be advanced either as evidence of guilt or as evidence in his favour," providing it be voluntarily given. As such the word *will* instead of *may* in the caution cannot act as an inducement capable of vitiating the voluntariness of a confession.⁴⁹

In respect of the interrogation of suspects, however, the judges in *Baldry* did not modify the basic principle prohibiting both magistrates and the police from questioning the suspect in relation to the offence upon which that suspect had been arrested or detained. Indeed Campbell, LCJ confirmed that under the common law both the judicial and extra-judicial interrogation of prisoners was absolutely prescribed.⁵⁰ He thereby indicated that an invasion on the right of the accused not to respond to questions inviting self-incriminatory replies remained a legitimate ground upon which judges might exclude confessions deemed to have been made involuntarily.

It had been argued that *Baldry* "considerably modified" the law respecting the exclusion of confessions with the result that the judicial trend in favour of "almost anything" being treated as an inducement to confess was, from the middle of the nineteenth century, reversed.⁵¹ However, the extra-judicial questioning of suspects in custody and the confessions obtained in consequence of this proscribed practice continued to provoke judicial hostility which was frequently articulated through the medium of the exclusionary rule.

In *Berriman*⁵² decided in 1854, the accused, at her preliminary examination, had been cautioned, after which she stated that she had nothing to say in answer to the charge. The presiding magistrate, before committing the prisoner, asked her a question to which she gave an incriminatory reply. Erle, J - who had also given judgment in the decision in *Baldry* - refused to receive the statement in evidence on the ground that it had been "so irregularly elicited" following a question that "ought never have been put."⁵³ The case also afforded Erle, J an opportunity to censure the police. The suspect had been apprehended and charged by a police officer who questioned her on the basis of rumours he had received suggesting she had concealed the birth of her child. There was no other evidence against the prisoner who made a statement in response to the questions put to her by the officer. In ruling the statement inadmissible Erle, J declared:

⁴⁹ *Baldry* (1852) 2 Den. 430, *per* Pollock, CB, pp.443-4 and Park, B, p.444.

⁵⁰ *Ibid.*, p.442.

⁵¹ 1 Stephen, 1883, p.447.

⁵² *Berriman* (1854) 6 Cox C.C. 388, p.389.

⁵³ *Ibid.*, p.389.

I very much disapprove of this proceeding. By the law of this country no person ought to be made to criminate himself, and no police officer has any right; until there is clear proof of a crime having been committed, to put searching question to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence, a police officer is justified, after a proper caution, in putting to a suspected person interrogatories with a view to ascertaining whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to.⁵⁴

This statement suggests that Erle, J accepted that the extra-judicial questioning of suspects by the police would undermine the judge-made privilege against compulsory self-incrimination afforded to individuals suspected or accused of crime. However, the judge appears to depart from the common law proscription against the interrogation of suspects in his intimation that such questioning would be acceptable provided, firstly, that it was based upon demonstrable or tangible evidence that an offence had been committed, secondly, that the questions were limited to establishing whether there were grounds for arrest and detention and, finally, that such questions were preceded by a proper caution. The remarks Erle, J made in respect of police questioning of suspects, therefore, may be regarded as ambiguous and essentially permissive.

The hostility some judges evinced towards the new police and their investigative practices was not, it would seem, entirely shared by Erle, J who tempered his condemnation with the remark that in his view "[w]hat was done here I have every reason to believe was done for no improper motive. It was doubtless, an error of judgement."⁵⁵ Perhaps, so far as Erle, J was concerned, the police had successfully legitimated themselves as key actors in the prosecution process. Presumably, had the judge found that the actions of the officer in question been born of disagreeable or "improper motives" he would have adopted a less favourable view. Nevertheless, it is difficult to appreciate in what respect the motive or intention of the officer could be of relevance to the admissibility of evidence obtained in contravention of the prohibition against any questioning of suspects and in violation of a voluntariness test that required judges to assess the likely effect any inducement might have had on the presumptively uninhibited mind of the accused.⁵⁶ In excluding the evidence in this case, Erle, J seems to have

⁵⁴ *Ibid.*, pp.388-89.

⁵⁵ *Ibid.*, p.389.

⁵⁶ See *Jarvis* (1867) 10 Cox. C.C. 57.

appreciated this and have intended that the police also acknowledge the point since he felt it necessary to add:

I wish it to go forth amongst those who are inferior officers in the administration of justice, that such a practice is entirely opposed to the spirit of the law.⁵⁷

Nonetheless, eight years later, in *Cheverton*⁵⁸ it was Erle, J who ruled that a failure on the part of the police to issue a caution to suspects would not necessarily result in the exclusion of confession evidence. Thus, illustrating that the caution was not to be regarded as a *sin qua non* to admissibility.

Much of the case law from the period following *Baldry* suggests an increasing acceptance of the police and of police interrogations. These cases also indicate that the caution was gradually relegated from what appeared to be a condition precedent to the admissibility of confession evidence to become a means of authenticating the evidential products of custodial interrogations conducted by the police. As long as the caution was issued, such interrogations - the probity of which remained debatable - were progressively legitimised behind rulings that purported to focus upon the issue of voluntariness. Yet where the caution was omitted incriminatory admissions made by suspects could, under this judicial interpretation of the voluntariness test, still be admitted in evidence against the defendant. Some judges, however, frequently reproached the police for engaging in "improper" investigatory practices though, with few exceptions, tended not to invoke the "disciplinary principle" to exclude evidence so obtained.⁵⁹

In the case of *Mick*⁶⁰ the suspect, while in police custody in connection with a wounding offence, was invited by an officer to make "a different statement" to that he made - denying any involvement in the offence - when first taken into custody. The prisoner replied: "Yes sir, I will tell the truth." At this point the prisoner was interrupted and cautioned before he continued to make his confession. Mellor, J addressed the police officer in the following terms:

⁵⁷ *Berriman* (1854) 6 Cox. C.C. 388, p.389.

⁵⁸ *Cheverton* (1862) 2 F. & F. 833, p.835, where Erle, J observed that to put questions to the suspect "without any caution was most improper especially since the prisoner does not seem to have to have been aware of their drift or object."

⁵⁹ See, for example, *Reason* (1872) 12 Cox C.C. 228; *Brackenbury* (1893) 17 Cox C.C. 628; *Miller* (1895) 18 Cox C.C. 54; *Hirst* (1896) 18 Cox C.C. 122; *Best* (1909) 1 KB 692; compare *Bodkin* (1863) 9 Cox C.C. 403; *Gavin* (1885) 15 Cox C.C. 656; *Male and Cooper* (1893) 17 Cox C.C. 689; *Histed* (1898) 19 Cox C.C. 16.

⁶⁰ *Mick* (1863) 3 F. & F. 322.

I think the course you pursued in questioning the prisoner was exceedingly improper. I have considered the matter very much: many judges would not receive such evidence. The law does not intend you, as a policeman, to investigate cases in that way. I entirely disapprove of the system of police officers examining prisoners. The law has surrounded prisoners with great precautions to prevent confessions being extorted from them, and the magistrates are not allowed to question prisoners, or to ask them what they have to say; and it is not for policemen to do these things. It is assuming the functions of the magistrate without those precautions which the magistrates are required by the law to use, and assuming functions which are entrusted to the magistrates and to them only.⁶¹

This forthright judicial condemnation in defence of the rule of law and in favour of the rights the law extends to individuals suspected of involvement in criminal activity makes clear that judicial opinion was divided as to whether such questioning should render subsequently obtained confessions inadmissible. In this instance, however, while Mellor, J "entirely disapprove[d]" of the practice of police officers questioning prisoners to extract confessions from them - a practice denied to both magistrates and to judges - he found the evidence admissible. This decision, therefore, brings into sharp focus a fissure between the due process rhetoric of the law and the crime control practice of the law. Thus, while some judges took exception to unauthorised custodial interrogations conducted by the police, this practice - as the head-note in the report of *Mick* indicates - "does not render the evidence so obtained inadmissible".

The Crown Against Johnston

Twelve years after the case of *Baldry*,⁶² the law and the conflicting authorities pertaining to the admission of confession evidence, the legal delineation of the concept of voluntariness and the scope of the exclusionary rule as it related to police interrogations, were comprehensively considered by senior members of the Irish judiciary. The case is significant not only because of its status as an authority cited in English courts during the nineteenth and early twentieth centuries but also because of the insight it affords to contemporary thinking regarding the admissibility of confessions and, finally, because of its early recognition of the problems raised by the custodial environment, the psychology of confessions and police interrogations.

⁶¹ *Ibid.*

⁶² *Baldry* (1852) 2 Den. 430.

The case of *Johnston*⁶³ was reserved for the opinion of eleven of the judges in the Court for Crown Cases Reserved on the question of the admissibility of confession evidence made in the following circumstances. The accused, Mary Johnston, was suspected, having been followed by two police officers, of having stolen a number of boots from a shop. The officers, who were in plain clothes, apprehended the suspect at a railway station where they identified themselves and proceeded to question her in respect of a parcel she was carrying containing boots. It was stated in evidence that the officers did not caution the suspect or inform her that had she attempted to leave her captors, she would have been prevented from doing so. During the course of the interrogation, the parcel was taken from the prisoner after which she admitted that she had taken the boots from the shop. Only when this admission was made was the prisoner cautioned, formally arrested and taken to a police station.

The eleven judges agreed that the voluntariness test governed the admissibility of extra-judicial confessions. Under this test the confession made by the prisoner was held, by a majority of eight to three, to have been properly received in evidence. However, the opinions of the judges, though couched in terms of the voluntariness rule, were diametrically opposed in respect of the application of that rule, with the majority applying it restrictively.⁶⁴

On the basis of his understanding of the voluntariness test, Deasy, B could find no legal objection to the admission of the confession evidence. Furthermore, in respect of the proposition that any statement made by an accused person in answer to questions put by a constable is not, on that ground alone, receivable in evidence, Deasy, B found that:

The fact that the statement was elicited by questions so put, may be an element in leading to the conclusion that it was made under the influence of fear or hope excited by a person in authority, but we could not decide that it was *per se* sufficient to cause the rejection of the statement, without overruling the numerous cases in which such statements have been received in evidence against prisoners both in England and Ireland.⁶⁵

While this comment indicates an indulgent approach to the police practice of questioning suspects in custody, it also suggests that statements elicited by such questioning could,

⁶³ *Johnston* (1864) 15 ICLR. 60.

⁶⁴ The majority comprised: Deasy, B; Fitzgerald, J; Keogh, J; Hughes, B; Fitzgerald, B; Monahan, CJ; Ball, J; and Hayes, J.

⁶⁵ *Supra.*, n.63, p.80.

under the voluntariness rule, be excluded in the absence of any explicit threats or promises.

Deasy, B referred to the Act which regulated the manner in which voluntary admissions should be taken in proceedings before magistrates.⁶⁶ It had been contended that as this Act precluded magistrates from interrogating prisoners, it would be "unreasonable" to allow police officers to do so.⁶⁷ However, the judge argued that the proviso to section 18 of the Act⁶⁸ made clear that the law had not been altered by the Act in the respect that it could not affect the admissibility of statements made to police constables any more than it could affect those made to any other person. He cited *Lambe's Case*⁶⁹ in support of his opinion that the law did not prevent the admission of such statements and that in the seventy-three years following *Lambe's Case* the law had not been changed.⁷⁰ He then observed that:

If the objection that the statement of the accused were made in answer to questions put by policemen were to prevail, that objection would apply still more strongly to answers made to questions by a magistrate, since his authority, and consequently his influence over the accused, considerable exceeds that of the policeman, yet it has been held, more than once that answers to questions so put are admissible against the prisoner.⁷¹

That some of the decided cases had ruled in favour of the admission of such evidence cannot be disputed. However, it seems that Deasy, B so misunderstood the section 18 proviso and *Lambe's Case* as to distort his interpretation of the voluntariness requirement. A close reading reveals that neither the section 18 proviso nor the decision in *Lambe* are authorities in favour of the admissibility of statements made *in answer to police questions*. Rather, they hold for the proposition that pre-trial incriminatory admissions voluntarily made by the suspect either to police officers, to magistrates or to witness-prosecutors, may

⁶⁶ 12 & 13 Vict. c.69 (1849). This Act replicated for Ireland the English Act, 11 & 12 Vict., c.42 (1848). Its provisions regarding the examination of suspects, were incorporated into The Petty Sessions (Ireland) Act, 1851 (14 & 15 vict. c.93.).

⁶⁷ *Supra.*, n.63, p.77.

⁶⁸ The proviso to s.18 of the 1849 Act duplicates the same in s.18 of the 1848 Act, *supra.* n.66. The proviso states "that nothing herein enacted or contained shall prevent the Prosecutor in any Case from giving in Evidence any Admission or Confession or other Statement of the Person accused or charged, made at any Time, which by Law would be admissible as Evidence against such Person."

⁶⁹ *Lambe's Case* (1791) 2 Leach. 552.

⁷⁰ *Supra.*, n.63, p.77.

⁷¹ *Ibid.* at pp.77-8.

be received in evidence against their author. Deasy, B apparently, failed to appreciate that the Act gave statutory force to the voluntariness requirement and limited the power magistrates had enjoyed - under the Marian legislation of the mid-sixteenth century - to question suspects brought before them.⁷² It would seem, therefore, that the judge did not adequately address the suggestion that it was "unreasonable to allow the constable to interrogate the prisoner, while the Magistrate, before whom it is the duty of the constable to bring him, is precluded from doing so."⁷³ Indeed, Deasy, B expressed his reluctance to give an opinion as to any distinction between incriminatory statements made in answer to questions and those made without the instrumentality of questions,⁷⁴ preferring to be guided by the decision of *Hughes*.⁷⁵ In that case Crampton, J is reported to have said:

The confession of a man, to be admitted, is not to be extorted by fear or induced by flattery; but when a person voluntarily gives it, it may be received, whether the questions be put to him by an authorised or unauthorised person; wherever the declaration is voluntary he would receive it....⁷⁶

Thus, for Deasy, B the questioning of suspects was not necessarily proscribed by the law and was not of itself destructive of the requirement of voluntariness.

For Ball, J the principle to be derived from the conflicting authorities established that statements made by a prisoner in answer to questions put by a police officer, without a caution, are admissible in evidence "provided there has been no threat or inducement held out calculated to influence him to make the statement."⁷⁷ His use of the word "calculated" suggests that for him the test of voluntariness should place emphasis not upon the subjective assessment of the prisoner, or the questioner, but upon the objective intentions and conduct of the questioner. Furthermore, Ball, J was satisfied that the caution was irrelevant to the issue of voluntariness and thus to the admissibility of confession evidence. He argued that a distinction should be drawn between the legality and the expediency of

⁷² *Ibid.* p.90, *per* O'Brien, J "It appears to me that such proviso refers to voluntary statements, made by the prisoner of his own accord, but not to answers given by him, while in custody, to questions put by a magistrate or policeman."

⁷³ *Ibid.*, p.77.

⁷⁴ *Ibid.*, p.79.

⁷⁵ Reported in *Joy on Confessions* (1842), p.39.

⁷⁶ Quoted in *Johnston, supra.*, n.40, pp.79-80.

⁷⁷ *Ibid.*, p.106.

the practice of interrogating suspects.⁷⁸ The voluntariness rule was limited to the issue of whether admissions obtained from prisoners through the instrumentality of police questions, even in the absence of a caution, were free from the operation of explicit hopes or threats on the mind of the prisoner.⁷⁹ Therefore, the legality of the police expedient of questioning suspects to obtain "voluntary" admissions receivable in evidence was, on this view, irrelevant to the judicial determination of whether those admissions were improperly induced by threats or promises.

Monahan, CJ considered it unnecessary to attempt to reconcile the "absolutely irreconcilable" authorities which failed to provide clear guidance for the purposes of the present case.⁸⁰ He argued, nonetheless, that the highest of those authorities clearly established "that the fact of a confession having been made by a prisoner in custody, to a constable in whose custody he is, does not render the confession inadmissible."⁸¹ Thus, "after giving the matter the most full consideration", he concluded that the mere asking of questions by a policeman was not "calculated to convey to the prisoner either hope of benefit or threat of injury."⁸² He seemed to accept that it was quite possible that in the absence of anything being done that could be construed as an inducement, a suspect in police custody who is asked questions "may, not unnaturally, be under the impression that it is for his advantage to make a statement in answer to the question so asked."⁸³ He nonetheless found that as answers not amounting to a full confession of guilt had been received in evidence, it was, therefore, difficult to sustain an objection to the admissibility of a full confession merely on the ground that it resulted from police questions.⁸⁴

In a comment explicitly accepting the extra-judicial questioning of suspects by the police as a legitimate method of criminal inquiry, Monahan, CJ suggested that where:

a constable finds a party under suspicious circumstances, in possession of property, which he has grounds to suspect as being stolen. I do not doubt that under such circumstances the constable is justified in making inquiries in relation to the property, in order to determine whether he shall arrest the party or

⁷⁸ *Ibid.*, p.108.

⁷⁹ *Ibid.*, pp.109-10.

⁸⁰ *Ibid.*, pp.124-5.

⁸¹ *Ibid.*, p.125.

⁸² *Ibid.*, p.127.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, pp.127-8.

not. Even though this inquiry is continued beyond the point when the constable determines in his own mind to arrest the party, I cannot consider the questions so asked, or the answers given, come within the rule laid down by Chief Justice Wilde [in *Pettit*⁸⁵], whether these answers be a denial or confession of the [prisoner's] guilt.⁸⁶

The judge did not indicate what might constitute the "suspicious circumstances" which could attract police questions. His comment suggests that the police themselves were to determine not only the parameters of this essentially indeterminate and legitimating legal construct, but also the extent to which their investigative methods should rest on questions put to suspects designed to elicit self-incriminatory admissions; leaving the judges to make *post hoc* assessments of the voluntariness of those admissions but not of the legality of custodial interrogations.

The dissenting judges also considered the central issue to be the voluntariness of the confession evidence. However, they inclined to a less narrow view of the application of the voluntariness test. O'Brien, J was satisfied that the accused considered herself to be in custody when questioned by the police. He argued that the police officer asked questions of the accused, not to regulate his own conduct but to elicit an answer that would establish her guilt. "Having attained his object", the judge remarked, "he then goes through the mockery of giving her a caution."⁸⁷

For this judge, the caution required by statute to be issued by magistrates demonstrated "that the intention of the Legislature was to give the prisoner an opportunity of making any statement he desired; but not to allow the Magistrate to interrogate him, save by asking him, in general terms, if he desired to say anything in answer to the charge."⁸⁸ Should a magistrate transgress his duty and interrogate the prisoner so as to establish guilt, the answers to such interrogatories would not be receivable in evidence under the Act. That Act was framed for the purpose of ensuring that confession evidence was voluntary; not extracted by questions; and made after the prisoner was appraised of the effect his statement might have. The reception in evidence of confessions obtained in contravention of the Act would "frustrate the policy of the Act, and render the securities thereby provided with regard to the prisoner's statement of little or no value."⁸⁹

⁸⁵ *Pettit* (1850) 4 Cox C.C. 164.

⁸⁶ *Johnston, supra.*, n.63, p.129.

⁸⁷ *Ibid.*, p.88.

⁸⁸ *Ibid.*, p.89.

⁸⁹ *Ibid.*

In the view of O'Brien, J, quite apart from the provisions of the statute, answers given by a prisoner to questions put to him by those who have him in custody, could not be considered as voluntary statements, unless the prisoner is first informed that he is not obliged to answer the questions and that any answer given may be used against him at his trial. He insisted that:

The very fact of these questions being put by a person, unaccompanied by any such caution, conveys to the prisoner's mind the idea of some obligation on his part to answer them, and deprives the statement of that voluntary character which is essential to admissibility.⁹⁰

Furthermore, according to the rhetoric of the common law:

A prisoner, upon his trial upon a plea of not guilty, before any tribunal in this country, from the highest to the lowest, cannot be interrogated as to any matter whatever; and I trust that the practice prevailing in other countries will never be legalised here.⁹¹

The judge considered the case of *Wilson*⁹² - which concerned the examination of a prisoner by a magistrate - to be "equally applicable to the case of a prisoner being examined by a policeman; and more so in the present case, in which the mode of questioning was such as would be adopted on cross-examination of an adverse witness."⁹³

Under his examination of the case law O'Brien, J acknowledged that there appeared to be "a conflict of authority" on the question of the admissibility of statements elicited by extra-judicial questions. He was of the opinion, however, that "the preponderance of authority is against the reception of the evidence."⁹⁴

In concluding that the evidence in the present case was improperly received, the judge suggested that the police should be deterred from adopting a "system" of questioning which exploited the apprehensions of prisoners.⁹⁵ However, O'Brien, J seems to have

⁹⁰ *Ibid.*, p.90.

⁹¹ *Ibid.*, p.88.

⁹² *Wilson* (1817) 1 Holt. 597, where Richards CB stated, "an examination, of itself, imposes an obligation to speak the truth."

⁹³ *Johnston, supra.*, n.63, p.94.

⁹⁴ *Ibid.*, p.105.

⁹⁵ *Ibid.*

considered an absolute prohibition of the practice to be unattainable since he felt that it would "be far better for the administration of justice, to hold that the police should be at liberty, without the risk of censure, to question a prisoner."⁹⁶ Though he suggested that such questioning should be limited so as to guide police investigations for the discovery of other evidence. He also felt that the answers to police questions should not be adduced in evidence against a prisoner on his trial.⁹⁷

Lefroy, CJ also found that the decisions of individual judges in the existing case law had generated "a mass of varying and somewhat contradictory authority". He considered it the object of the Court to extract from those authorities a clear and common principle to guide magistrates and policemen in the exercise of their duties.⁹⁸ He argued that it was a "great mistake" to confine the inquiry into whether the confession had been voluntarily given. A confession may be made under circumstances where there has been no specific inducement and yet be made involuntarily.⁹⁹

In his suggestion of an extended definition of voluntariness Lefroy, CJ shifted the inquiry from the question of the inducements of threats or promises to the psychological and emotional pressures attending the arrest, detention and interrogation of the prisoner. The caution was required to ensure, first, that the prisoner was not entrapped and, secondly, to inform him that his statements would be taken down in writing and might be used against him. He argued that questioning by the police should be limited to justifying themselves to the individual under suspicion but they should not "be privileged to give in evidence the answers they may receive to those questions."¹⁰⁰ In respect of the present case, he found that there was "a regular cross-examination of the prisoner, by which she was brought into this dilemma- either she should convict herself of having told a falsehood ... or she must confess the crime."¹⁰¹

Lefroy, CJ, therefore, was of the opinion that although there was no express threat or promise held out, the police, by their questioning, had employed "an ingenious stratagem, which had the effect of making [the accused] the deluded instrument of her own

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, p.130.

⁹⁹ *Ibid.*, pp.130, 133.

¹⁰⁰ *Ibid.*, p.133.

¹⁰¹ *Ibid.*, p.134.

conviction."¹⁰² Thus, the statement obtained from the accused was not made freely and voluntarily.

The view taken by Pigot, CB was similar. For Pigot, CB, it was "undeniable" that there had been a "diversity of practice" among judges as to the reception of confession evidence. However, he also agreed that the "great preponderance of authority" had been against its reception.¹⁰³ He too drew a distinction between the investigative and prosecutorial functions of the police, arguing that questions may be put to determine whether there were reasonable grounds for arresting a suspect but "answers elicited by interrogations put with a view to establish the guilt of the prisoner in custody, and thus to make him, while a prisoner, his own accuser," should not be received in evidence against him at his trial.¹⁰⁴

In considering whether statements made in answer to police questions may be voluntary, the judge also considered the psychological significance of criminal investigations for the suspect and suggested that judges should have regard not only to the relative positions of the suspect and interrogator "but also to the ordinary infirmities of mankind, especially those which are likely to exist among the ignorant and uneducated in the lower classes of society."¹⁰⁵ Such a prisoner, he continued, may not be induced by direct promises or threats yet may be "actuated by hope that his answers will lead to his liberation, or fear that his answers may cause his detention in custody.... Manner may menace and cause fear as much as words. Manner may insinuate hope as well as verbal assurances. The very fact of questioning is in itself an indication that the questioner will or may liberate the answerer if the answers are satisfactory, and detain him if they are not."¹⁰⁶

Lefroy, CJ also felt that, even after a caution has been administered, when a police officer puts a series of searching interrogatories to a suspect "he virtually, and I think, actually and in effect, abandons the caution, and announces, by the very course of interrogation which he applies, that it is better for the prisoner to answer than be silent."¹⁰⁷ He suggested that it was for this reason magistrates were prohibited from questioning

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, p.118; see also p.119.

¹⁰⁴ *Ibid.* at p.121.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p.122.

¹⁰⁷ *Ibid.*

suspects except to ask whether they wished to reply to the charge. The 1848 Act,¹⁰⁸ he argued, recognised that:

The process of question[ing] impresses, on the mind of the greater part of mankind, the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency; and impels him to answer, from fear of the consequences of declining to do so. Daily experience shows that witnesses, having deposed to the strict truth, become, on a severe or artful cross-examination, involved in contradictions and excuses, destructive of their credit and of their direct testimony. A prisoner is still more liable to make statements of that character, under the pressure of interrogatories urged by the person who holds him in custody; and thus truth, the object of the evidence of admissions so elicited, is defeated by the very method ostensibly used to attain it.¹⁰⁹

Thus, the very circumstances in which a police officer has custody of a suspect - by virtue of their relative positions of power - negatives the capacity of the prisoner to act as a free agent.

It would seem, therefore, that Pigot, CB was suggesting that whether a statement made under such conditions resulted from police questions or not, that statement could not be presumed to have been voluntarily made. Indeed, he intimated that such circumstances furnish the "strongest presumption" that any statement, so elicited, was not voluntary since the interrogation environment is of itself "calculated" to cause the answers elicited to be influenced by hope *and* fear.¹¹⁰

The view of the scope and operation of the exclusionary rule advanced by Hayes, J, to some extent, represents a compromise between the broad approach of the minority judges and the narrow approach adopted by the majority.¹¹¹ For him, the law regarding the admissibility of confessions made in the course of criminal proceedings depended upon which of the three primary phases of the prosecution process they are made.¹¹² As to a confession made in open court, the trial judge is to satisfy himself that it is made freely and voluntarily before it can be received in place of a conviction by a jury.¹¹³ Secondly, a

¹⁰⁸ 11 & 12 Vict. c. 42, s.18; see also its Irish equivalent, 12 & 13 Vict. c.69, s.18.

¹⁰⁹ *Johnston, supra.*, n.63, p.122

¹¹⁰ *Ibid.*

¹¹¹ Jackson, 1985, p.214.

¹¹² *Johnston, supra.*, n.40, p.81.

¹¹³ *Ibid.*, pp.81-2.

confession made before a committing magistrate under the governing Act is only receivable when it is preceded by a due caution from the magistrate inviting the prisoner to make a voluntary statement in answer to the precise case against him.¹¹⁴

Of the pre-trial investigative phase, Hayes, J observed that the admissibility of a confession made at any time after the commission of the offence until the accused is brought up for trial was "not regulated by any statutory enactments but [was] governed wholly by the principles Common Law, as enunciated in the maxim *nemo tenetur prodere seipsum*, and by judicial decision in elucidation of that maxim."¹¹⁵ He argued that neither the common law nor the statute required this class of confession to be preceded by a caution. The common law, however, required this class of confession to be made voluntarily. "But that word", he added, "is to be understood in a wide sense, as requiring not only that the prisoner should have free will and power to speak, or refrain from speaking, as he may think right, but also that his will should not be warped by any unfair, dishonest, or fraudulent practices, to induce a confession."¹¹⁶ So that while judges have refused to receive confessions in evidence that have been either certainly or probably elicited by promises or threats, confessions may also be rejected if it appears that they have been extracted by "the presumed pressure and obligation of an oath, or by pestering interrogatories, or ... made by the party to rid himself of importunity, or ... by subtle and ensnaring questions, as those which are framed to conceal their drift or object, he has been taken at a disadvantage, and thus entrapped into a statement which, if left to himself, and in the full freedom of volition, he would not have made."¹¹⁷

These the judge instanced as "several ways in which a confession may be unfairly and improperly procured, so as to deprive it of the character of being voluntary."¹¹⁸ Indicating that for Hayes, J the legality of police interrogations was to be judged by its evidential fruits. This attitude suggests that the practice of police officers putting questions to suspects held in custody was not to be prohibited. Judges were to place greater emphasis instead upon the nature and circumstances of that questioning to determine whether the elicited was voluntarily given. Only where police investigative methods generated evidence deemed to have been elicited in a manner which deprived a confession of its character of being voluntary, would it be denied to the police.

¹¹⁴ *Ibid.*, pp.82-3; compare *Stripp* (1856) 1 Dears. 648.

¹¹⁵ *Ibid.*, p.83.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, p.84.

¹¹⁸ *Ibid.*, p.84.

According to Hayes, J. police officers having custody of prisoners, were required "so far as possible to preface with a caution every communication between them that tends to a confession", only as a matter of practice, rather than by statutory or common law prescription.¹¹⁹ While he accepted that "from the moment a person feels himself in custody on a criminal charge, his mental condition undergoes a very remarkable change, and he naturally becomes much more acceptable to every influence that addresses itself to his hopes and fears",¹²⁰ it was for the purpose of counteracting such influences that the police followed the practice of cautioning suspects, so as to preserve the mental freedom of the suspect "the better to ensure a voluntary confession, but not as in all case essential to it."¹²¹

It may be objected in opposition to this assessment that whether of statutory or common law origin or as a result of mere and more recent practice, the source of the caution required to be given to the suspect by the police cannot be readily distinguished from that to be given by magistrates if it is considered that its purpose is to facilitate voluntary avowals of guilt. It seems, however, that Hayes, J was attempting to demonstrate that while the caution existed as a statutory element of the proceedings before a magistrate, where the police omit to caution a suspect and obtain an admission through questions, the admissibility of that evidence was a question for the judge under the voluntariness test. As Hayes, J himself put it:

Whether a confession be or be not voluntary, is a question altogether for the judge to decide, when all the circumstances have been laid before him in evidence; and if he, in the sound exercise of his understanding, be well satisfied that it is the voluntary and unbiased effusion of the mind of the criminal, though it may have been elicited by questions, he will be bound to receive it in evidence; as otherwise he would be unwarrantably contracting, if not wholly stopping up, one of the avenues of justice.¹²²

The judge felt that the authorities and judicial pronouncements, made "for the better guidance of the discretion of the judge,"¹²³ supported his interpretation of the law. He accepted that the ruling of Erle, J in *Berriman*,¹²⁴ stood against him but was "by no means

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*, pp.84-5.

¹²³ *Ibid.*, pp.84-5.

¹²⁴ *Berriman* (1854) 6 Cox C.C. 388.

prepared to accept it as a sound exposition of the law. It would [if followed] lead ... to results very injurious to society," in that it would mean that a constable who - acting under a duty imposed upon him by law - has full powers "to arrest a person reasonably suspect of crime, though no crime was committed," would be prevented from questioning "the suspected party, though not a prisoner, as to the grounds of suspicion, until he had first satisfied himself that the crime suspected had really been committed."¹²⁵

For Hayes, J, therefore, the voluntariness test should be applied, under the discretion of trial judges with reference both to the due process protections afforded to suspects together with the considerations of crime control, which demand that the ability of the police to conduct criminal investigations for the state and acquire incriminatory information from those they "reasonably" suspect, should not be unduly inhibited. The parameters of due process and of crime control are obscured. The reasonableness of police suspicions becomes a matter for the subjective evaluation of the police themselves, reviewable only in the discretion of the judge in his *post hoc* assessment of "voluntariness", implicitly widening the scope of police powers to arrest and interrogate individuals in custody, even when there is no evidence of an offence having been committed.

In respect of the instant case Hayes, J found the confession was properly received in evidence under what appears to be a narrow application of the voluntariness test, coupled with a casuistic evaluation of whether the accused, at the time of her confession, was in fact custody. In his assessment, the confession was not obtained by any threat, promise or other undue or unfair means and was "made at a time when the party neither was a prisoner, nor felt or supposed herself to be a prisoner".¹²⁶

Clearly the judge did not approve of the contention that Johnston was, in effect, in police custody when she answered the questions put to her. The basis upon which he concluded that she did not consider herself to be so is unclear. Yet, somewhat paradoxically, the judge found that "had she felt herself to be in custody on the criminal charge, then her statements, in answer to the questions would not have been receivable, unless prefaced with a caution" since she would have not have been at liberty to speak or to refrain from speaking but bound to account for herself.¹²⁷

The judgment of Hayes, J highlights the conflict inherent in the opposing values of crime control and due process. If the accused was in custody then the legal rhetoric of due process would, presumably, have been given practical effect. However, in the context of

¹²⁵ *Johnston, supra.*, n.63, p.86.

¹²⁶ *Ibid.*, pp.86-7.

¹²⁷ *Ibid.*, p.87.

police interrogations, that due process rhetoric should not suggest a "morbid sensibility towards criminals." This, Hayes, J felt, would be the result should judges hold that:

the falsehoods and equivocations uttered by a person not in custody, but strongly suspected of crime, to a constable interrogating him on the grounds of his suspicion, and all uttered for the deliberate purpose of baffling suspicion and evading detection, but nevertheless tending, with subsequent discovery, to show not only that he was a thief, but a thorough adept in the practice, were to be a sealed book for the purposes of evidence against him, unless the constable were, by a formal caution given, to instruct the party as to the full extent of his (the constable's) suspicions, and to frustrate all the good effects to be expected from interrogation.¹²⁸

In short, the considerations of due process should be denied to "criminals" (even before they are convicted as such) when under investigation by the police.

Conclusion

The judicial opinions given in the *Johnston* decision are illustrative of the imprecise nature of the law in the second half of the nineteenth-century respecting the admissibility of confession evidence as it related to the growing police practice of interrogating suspects in custody and as it evolved under the decisions of individual judges in the authorities. These conflicting authorities, as presented in *Johnston*, appear to have been drawn upon in an attempt to give effect to both the concerns of crime control and to the rhetoric of due process. Although considerations of crime control and of due process are exhibited by all the judges, those in favour of a broad application of the voluntariness test appeared to incline towards a due process stance, while the majority seem disposed to one of crime control. For the majority judges, crime control considerations predominated so that for them the act of questioning a suspect to obtain a statement could not of itself render that statement inadmissible. The voluntariness test merely required the judge to determine whether the specific inducements of threats or promises had been held out. In the absence of such inducements the statement, notwithstanding that it was obtained by police questions, is in strict law admissible against the accused.

In contrast, the dissenting judges appear to have given priority to values of due process. For them, in assessing the admissibility of confession evidence under the voluntariness rule, judges should presume that statements made by persons in police custody - without

¹²⁸ *Ibid.*, p.85.

that person being previously cautioned - to have been made involuntarily. Under this view, evidence suggesting that such statements were elicited by the instrumentality of police questions should buttress the presumption against voluntariness. Thus, the voluntariness rule should be given an extended meaning to effectuate the due process rhetoric of the law which purports to be opposed to making suspects the deluded instruments of their own conviction¹²⁹ and to be "against anything that could be calculated to excite the prisoner to confess."¹³⁰

Nevertheless, both majority and dissenting judges seemed to have regarded the custodial interrogation of suspects either as of great utility to the investigation of crime and the conviction of the guilty, or as a regrettable but unavoidable investigative technique that would generate potentially unreliable confessions which should not be received in evidence. This permits the conclusion that by the third quarter of the nineteenth-century there were the beginnings of a shift in judicial attitude away from one of hostility to *any* police questioning as to the guilt of the suspect that might be viewed as usurping the functions of the court, in favour of a more acquiescent attitude towards the investigative practices of the police, with necessarily *post hoc* efforts to ensure that the police did not exceed their legitimate duties or benefit from improperly obtained evidence gained in exceeding those duties.

In short, while the *Johnston* decision reveals that neither English nor Irish judges were in complete agreement as to the scope and application of the voluntariness test during the first half of the nineteenth century, the authorities cited and opinions delivered in the case indicate, firstly, that confessions made in an extra-judicial context were considered by judges to be legitimate when shown to have been made freely and voluntarily; and, secondly, that such confessions were viewed as being voluntary even when obtained by pre-trial questioning conducted by persons in authority provided the questions put to the accused did not involve explicit threats or promises. At a less superficial level, the case also serves to illuminate the essentially crime control view that was beginning to prevail amongst the judiciary in the third quarter of the nineteenth century respecting the contours of the relationship that was being established between suspected persons and the authority of state officials, be they justices or increasingly police officers, to question such persons before formal trial. It will be seen in the following chapters that this view provided the political space for the emergent police forces to assume control over the detention and pre-trial interrogation of suspects. While this development would initially meet with

¹²⁹ *Ibid.*, per Lefroy, CJ, pp.131, 134.

¹³⁰ *Ibid.*, per Lefroy, CJ, p.66.

considerable judicial opposition, by the early part of the present century the custodial interrogation of suspects by the police for the purpose of securing incriminatory statements and the admission of those statements in evidence would be legitimised by an increasingly corporatised judiciary.

TOWARDS THE REGULATION OF CUSTODIAL INTERROGATIONS

Introduction

The division of learned opinion articulated by the senior judiciary in *Johnston*¹ finds expression in the English decisions of the latter half of the nineteenth and early twentieth centuries which continued to generate contradictory case law. Indeed, in spite of the persuasive force of the *Johnston* decision in favour of the admission in evidence of the statement made by the suspect, as a voluntary, non-induced, response to police questions, English law remained unsettled. This suggests a degree of ambivalence on the part of individual judges, firstly, in respect of the custodial questioning of suspects by the police and, secondly, in regard to the admissibility of evidence obtained by such questioning. The greater number of these authorities indicate that the courts considered the interrogation of suspects in police custody to objectionable but not of itself sufficient to exclude a statement which in all other respects appeared to have been made voluntarily.² In some of these decisions the caution seems to have been viewed as an essential precondition to legitimise police interrogations. Thus, should it be asserted that the accused, while in police custody, was appraised of his or her right to remain silent and nonetheless went on to make an incriminatory statement, that statement would generally be received by the courts as being free from coercion, voluntarily made and, therefore, admissible in evidence. However, a number of decisions from the period suggest that judges increasingly admitted confessions as voluntary statements even where the accused had not been formally cautioned. These cases illustrate that the narrow interpretation given to the voluntariness test by the majority decision in *Johnston*, was generally followed by the English courts.

The 1867 case of *Jarvis*³ is an example. The accused, a servant of the witness for the prosecution, had been told - in a private office and in the presence of two police officers - to "answer truthfully" questions put to him concerning the theft of certain property belonging to his master. The accused was also told "that if you have committed a fault, you may not add to it by stating what is untrue." In his evidence, the prosecutor informed

¹ *Johnston* (1864) 15 ICLR 60.

² See *Ibrahim* (1914) AC 599, *per* Lord Sumner, pp.609-14. See also Leigh, 1974, p.144.

³ *Jarvis* (1867) 10 Cox C.C. 574.

the court that he had also said: "Take care, Jarvis, we know more than you think we know."

The Recorder of London admitted the ensuing confession in evidence. Jarvis was found guilty by the jury which, nonetheless, expressed reservations in regard of a confession which "they thought [was] prompted by the inquiries put to him". At the request of counsel for Jarvis, the case was reserved for the consideration of the Court for Crown Cases Reserved. The unanimous decision of the Court was delivered by Kelly, CB who said:

I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced, either by a threat or a promise, to say anything of a incriminatory character against himself.⁴

In spite of his apparent respect for the rights of the individual, Kelly, CB entertained "no doubt" that the words used by the witness to Jarvis did not import a threat or promise. The words, he observed, operated "only as a warning to put the accused on his guard as to how he should answer" and could not, therefore, prevent the answer from being admissible.⁵

In *Regan*,⁶ decided in the same year, the prisoner was questioned by the police officer, in whose custody he was, without a caution and after the prisoner had been charged. It was objected that under these circumstances the statement made could not be taken to be a voluntary statement since it "was clearly obtained by pressure."⁷ The report notes that the practice of questioning prisoners in custody was deprecated by Shee, J who, nevertheless, "held that the evidence could not be excluded from the case, as he did not think it amounted to a threat, and did not therefore come within the rule excluding such statements."⁸

These and other such cases from the period which ruled in favour of the admission of evidence elicited by police interrogations, suggest a reluctance on the part of some judges to incorporate a disciplinary dimension into the exclusionary rule. These cases also indicate the exclusion of full or partial confessions under this rule was to depend upon narrow considerations of the influence of "improper inducements" on the minds of

⁴ *Ibid.*, p.576.

⁵ *Ibid.*

⁶ *Regan* (1867) 17 LT 325.

⁷ *Ibid.*, p.326.

⁸ *Ibid.*

prisoners sufficient to render an incriminating statement unreliable, even where the caution had been omitted. This judicial reluctance appears to have been founded upon crime control values, which enjoyed primacy over those of due process, together with a growing acceptance of the "new" police who had - to some extent through successful prosecutions - acquired legitimacy as a vital arm of law enforcement. These cases show, therefore, that the protections professed, under the due process rhetoric of the law, to be afforded to suspects from compulsory incrimination were, in reality, made conditional and contingent upon narrow conceptualizations of "voluntariness".

Facilitating Custodial Interrogations

Although the exclusionary rule articulated in *Warickshall*⁹ is said to have the reliability principle as its primary rationale,¹⁰ nineteenth century commentators such as Taylor, writing in his *Treatise on the Law of Evidence*,¹¹ maintained that the disciplinary aspect of the voluntariness requirement was "a more sensible reason" for excluding evidence obtained under an improper inducement.¹² Counsel for the prisoner in the case of *Reason*¹³ drew the attention of the presiding judge to this authority. Sarah Reason had been indicted for the murder of her child. Prior to her formal arrest, a police officer had put questions to, and obtained statements from, her. However, she only confessed following the importunate remark: "I must know more about it", which the officer made to her. Keating, J admitted the evidence and in summing up observed:

In my time it used to held that a mere caution given by a person in authority would exclude an admission, but since then there has been a return to doctrines more in accordance with the common sense view.¹⁴

⁹ *Warickshall* (1783) 1 Leach. 263, see pp.263-4.

¹⁰ See 3 Wigmore, 1970, p.246; Williams, 1983, pp.224, 251; Mirfield, 1985, pp.48,61-65.

¹¹ 4th edn., 1864.

¹² *Ibid.*, pp.754-5.

¹³ *Reason* (1872) 12 Cox C.C. 228.

¹⁴ *Ibid.*, p.229.

The judge found that when the police constable addressed the prisoner he was merely "stating his reason for making further inquiries." It would, therefore, "be straining the rule to an unnatural extent to exclude the admission, especially as it was made in the course of a narrative."¹⁵

It is not made clear how the narrative context in which the words used by the police constable should be relevant to the issue of whether the statement made by the prisoner resulted from an inducement sufficient to satisfy the requirements of the exclusionary rule. However, in respect of the inquisitorial role played by the police officer, the judge, in evading a direct invitation to invoke the disciplinary principle, made the following ambiguous remark:

It is the duty of the police-constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the constable to ask any questions. So, when the police-constable has reason to suppose that the person will be taken into custody, it is his duty to very careful and cautious in asking questions.¹⁶

At a glance this statement would seem to clarify the scope of police powers to question in relation to the individual freedoms of citizens. However, closer consideration exposes its equivocality. Keating, J implies that the police may receive admissions voluntarily made by suspects not in custody but may not ask questions of such suspects. He then suggests that the suspect may not be questioned once taken into custody. In doing so, however, he implicitly contradicts his earlier suggestion by allowing the inference that pre-custodial questioning of suspects, without a caution, is permissible. He then suggests that the questioning of suspects detained in police custody may be sanctioned if conducted in a "careful and cautious" manner. Finally, the ambiguity is compounded by the failure of the judge to indicate whether the act of subjecting a suspect to interrogatories may of itself also constitute custody.¹⁷

The attitude of Keating, J to police interrogation runs counter to that expressed by Cockburn, LCJ who, in the 1877 *Yeovil Murder Case*,¹⁸ unambiguously re-affirmed that:

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See *Booth and Jones* (1910) 5 Cr.App.R. 177, where it is suggested that the issue as to what may constitute custody is a question for the judge.

¹⁸ *Yeovil Murder Case* (1877) 41 JP 187.

the law did not allow a man under suspicion and about to be apprehended to be interrogated at all.¹⁹

He further pointed out that as a "judge, magistrate or jury could not do it" it was a "great mistake" for the police to presume to do so.²⁰ In spite of the eminent authority of this emphatic assertion of due process values, many of the decisions, from this period through to the early twentieth-century, that ruled in favour of the reception in evidence of admissions obtained under police interrogations reveal an uncritical acceptance, on the part of judges, of the evidently intractable police practice of putting questions designed to invite incriminatory replies from suspects.²¹

In *Miller*²² it was proved that a detective inspector had said to the prisoner: "I am going to ask you some questions on a very serious matter, and you had better be careful how you answer." The answers the prisoner made were admitted in evidence by Hawkins, J who found "that no inducement was held out to the prisoner to make any admission." In concluding that the evidence was admissible as voluntary statements which the prisoner was not obliged to make, the judge contended that:

It was impossible to discover the facts of a crime without asking questions, and these questions were properly put.²³

This clear expression of the primacy of crime control values gives no consideration to the invasion of the common law "right" of the individual not to be compelled or induced to incriminate himself. Here it would seem that the possibility that the prisoner may have felt obliged to give only incriminatory answers so as to satisfy the inspector and the possibility that those answers might be of doubtful reliability was not considered.

In *Hirst*²⁴ the written statement of the co-accused was read to the defendant after he had been charged and cautioned. Counsel for the defendant argued for the exclusion of the

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See, for example, *Brackenbury* (1893) 17 Cox C.C. 628; *Miller* (1895) 18 Cox C.C. 54; *Hirst* (1896) 18 Cox C.C. 374; 60 JP 491; *Rogers v. Hawken* (1898) 19 Cox C.C. 122; 62 JP 279; *Best* (1909) 1 KB 692; 25 TLR 280; *Booth and Jones* (1910) 74 JP 475; 5 Cr.App.R. 177; and *Lewis v. Harris* (1913) 30 LTR 109; 78 JP 68.

²² *Miller* (1895) 18 Cox C.C. 54.

²³ *Ibid.*, p.55.

²⁴ *Hirst* (1896) 18 Cox C.C. 374.

resulting confession on the ground that the reading of the statement to the prisoner in custody "was virtually putting a question to him." It was contended that what the prisoner had said "was equivalent to an answer elicited by a question, and that the police had no right to question a prisoner in custody." The court, while appearing to accept that the police could not question detained suspects, held that the confession of the accused "having been made after he was cautioned, and having, when written down, been read and signed by him, was voluntary and that evidence of it was admissible."²⁵

This case serves again to illustrate the reluctance exhibited by some courts to apply the disciplinary principle - under which, in the exercise of judicial discretion, they could elect to exclude otherwise admissible evidence - to deny the police the fruits of their "improper" interrogative practices. Instead, the courts tended to adopt a narrow interpretation of the voluntariness rule which effectively insulated those practices from detailed judicial scrutiny; enabling judges to focus their attentions on the apparent "voluntariness" of confessions, rather than the circumstances in which they were made or the methods employed to procure them.

In *Rogers v. Hawkin*²⁶ the accused was charged with permitting a mare to be worked while in an unfit state. It was proved in evidence that a servant of the respondent, when questioned by a police officer, made a statement implicating his master. A uniformed inspector of the Royal Society for the Prevention of Cruelty to Animals (the appellant), later, in the presence of the police officer and "without any warning or caution", confronted the accused with a direct question concerning the offence. The replies of the respondent constituted the whole case against him. The absence of a formal caution appears to have been considered immaterial to Russell, LCJ who found that when the accused was questioned upon the incriminatory statement of his servant he "had the opportunity of either declining to reply or making an answer to it."²⁷ The confession was held to have been properly received in evidence.

Here the judge imputes a constructive caution to an event where the formal caution was omitted. This enabled him to attribute to the statements made by the accused the voluntariness necessary to render those statements admissible in evidence against the accused as uncoerced avowals of guilt.

It is clear that in viewing the authorities dating from the second half of the nineteenth-century, where admissions made in response to questions put by law enforcement officers

²⁵ *Ibid.*, p.375.

²⁶ *Rogers v. Hawkin* (1898) 62 JP 279.

²⁷ *Ibid.*

were received in evidence, that the caution was transformed from being considered a condition precedent to admissibility, to become a mere factor which judges considered as conducive to the admissibility of confession evidence. Similarly, the issue of what might constitute custody was increasingly used under the discretion of individual judges²⁸ to distinguish impermissible custodial police interrogations from other forms of legitimate extra-judicial questioning, such as that contemplated by section 18 of the 1848 Act.²⁹ This distinction not only had the effect of fostering the legitimisation of the non-custodial interrogation of suspects by the police, it ostensibly rendered custodial questioning subject to the exclusionary rule. However, this distinction also meant that the exclusion of custodial admissions made under police interrogatories depended either upon a judge accepting the suspect was indeed in custody, so as to attract the disciplinary principle, or upon the judge deeming any confession made in such conditions to be involuntary.³⁰ Therefore, the judicial discretion in respect of the recognition of "voluntariness" and of "custody" operated to create a two-tier obstacle against the exclusion of admissions made under police questioning.

In this regard the case of *Booth and Jones*³¹ is instructive. This was an appeal against conviction heard in the then recently constituted Court of Criminal Appeal³² on the ground that a confession, the only evidence against the appellant, had been forced from the accused, by a series of questions put by a Post Office investigator, while the accused was detained in custody. Counsel for the appellant submitted that as a police detective was present at the interview, which was preceded with a formal caution, the confession should have been ruled inadmissible in evidence since it was not made freely and voluntarily. Counsel also pointed out that the police officer had conceded that the accused, though interviewed at his own house, was indeed practically in custody and would not have been allowed to leave. To this Lawrance, J observed that "[a] policeman's eye is not custody." Darling, J added:

If this sort of investigation were not allowed very few crimes would ever be discovered.³³

²⁸ See Brownlie, 1960, pp.301-2.

²⁹ 11 & 12 Vict., c.42 (1848) s.18.

³⁰ See *Knight and Thayer* (1905) 20 Cox C.C. 711.

³¹ *Booth and Jones* (1910) 5 Cr.App.R. 177.

³² Formally constituted under the Criminal Appeal Act, s.1 (1907), the Court of Criminal Appeal superseded the Court for Crown Cases Reserved.

³³ *Booth and Jones* (1910) 5 Cr.App.R. 177, p.179.

Delivering the judgment of the court Darling, J found that the accused was given a "definite option either to speak or not to speak" when he was cautioned. The judge held that there had been no infraction of the exclusionary rule. The evidence was rightly admitted since the judge at first instance "came to the conclusion that there was no evidence to justify him in holding the interrogator had already determined to take [the accused] into custody or that he was then practically in custody."³⁴

Evidently, neither the trial judge nor the judges in the Court of Appeal accepted that the police detective had acknowledged that the accused was practically in custody during the interview. Yet it is clear from the judgment of Darling, J that "physical custody is not necessary to make such evidence inadmissible."³⁵ It would seem that had "custody" been ascribed by the judge to the context in which the interrogation had taken place, the confession, irrespective of its reliability, would have been excluded in an application of judicial discretion under the disciplinary principle.³⁶

Such cases notwithstanding, that the police persistently excited judicial opposition to custodial interrogations is demonstrated by a case heard in 1912 at the Marlborough Street Police Court.³⁷ In this case a magistrate had cause to reprimand a police inspector for questioning, at the rear of the court, a prisoner who had previously been arrested and was awaiting hearing. It was accepted on behalf of the police, after the "fullest consideration" that "once a man was in custody he should not be questioned in any form by a police officer." It was then argued "in extenuation" that the information the inspector had gained from the interrogation proved to be of advantage to the prisoner. The magistrate was then invited to "modify the strictures he passed on the inspector, who had absolutely no *mala fides* in putting the questions."³⁸ The magistrate observed that he found having to reproach the police "an unpleasant duty" and while he did not impute any *mala fides* to the inspector "it was the disregard of the general rule by an officer of position that caused him to make some grave remarks, and the fact that he felt that undue laxity was prevailing after he had

³⁴ *Ibid.*, p.180.

³⁵ *Ibid.*

³⁶ This view seems to have been adopted by Darling, J himself in *Lewis v. Harris* (1913) 30 LTR 109, p.110, where Darling, J states that it, "had never been laid down that a constable was bound to caution every one to whom he spoke.... It was another matter if a constable had made up his mind to take the person into custody; then he should give the caution. And if this rule were infringed the judge might reject the evidence...."

³⁷ This unnamed case is recorded in 76 JP, 1912, p.187.

³⁸ *Ibid.*

occasion to make similar observations rather frequently."³⁹ Finally, in alluding to the privilege against compulsory self-incrimination afforded by the courts to prisoners, the magistrate trusted that it would not be necessary for him to so admonish the police again.⁴⁰

Of those decisions in the nineteenth century that evinced a narrow conception of "voluntariness" within the exclusionary rule, the considerations of crime control are generally given primacy over those of due process. The practical effect of these decisions was to progressively legitimate the practice and utility of police interrogations. Confessions obtained under police questioning would generally be admitted in evidence even where the accused held in custody had not been cautioned of his right to remain silent. These authorities suggest that the exclusionary rule worked, somewhat paradoxically, to endorse and validate those "voluntary" confessions that were not induced by the actions of either express fears or hopes exercised by persons in authority; only when the fears or hopes of the accused had been excited by a person in authority using specific inducements designed to secure admissions would the evidence be excluded. As originally conceived, the exclusionary rule could not have anticipated the key role in the prosecution process the bureaucratised police were to acquire. As such the person in authority requirement and even the statutory caution of the mid nineteenth-century, did not contemplate the evolution and establishment of a new and professional criminal investigative agency, armed with non-statutory powers to detain and interrogate suspects in order to construct and prosecute cases against them at their trial. This notwithstanding, some individual judges continued to assert and give effect to the legal rhetoric of due process.

Due Process Values Upheld

The authorities from the second half of the nineteenth-century that excluded evidence obtained under extra-judicial interrogation, although less numerous than those that ruled in favour of its reception,⁴¹ suggest that some judges were more receptive to the contention that the very nature of unregulated police interrogations was inherently coercive upon detained suspects.⁴² In these cases the presiding judge would frequently re-assert the

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See *Ibrahim* (1914) AC 599, pp.609-14.

⁴² Rothblat and Rothblat, 1960, pp.63-4.

prohibition against any questioning of suspects as a crucial aspect of the privilege against compulsory self-incrimination, protecting the right of the accused not to testify at his trial and with it the associated right of the suspect to refuse to answer police questions.⁴³ Admissions obtained in consequence of such questioning would, therefore, be excluded as being involuntary and unreliable. Alternatively, the judicial discretion would be resorted to, to deny the police the use of such evidence obtained in breach of their position of authority and to deter them from engaging in unacceptable investigatory practices in the future.⁴⁴ These cases also reveal judicial attempts to inject due process principles into the pre-trial process to limit the permissible questioning of suspects by the police to that necessary to guide their legitimate investigations. Permissible police questioning was to be distinguished from police interrogations designed to extract incriminatory evidence from suspects and to implicate them in their own conviction. The case law, nonetheless, suggests that the demarcation was, firstly, inadequately drawn and enforced, and, secondly, inadequately understood, or indeed actively exploited, by the police whose drive for convictions, under the imperatives of crime control, conflated the ostensibly distinct investigative and prosecutorial aspects of the criminal justice process.

In the case of *Bodkin*⁴⁵ the court excluded evidence of what a prisoner had said in reply to questions put by the arresting police officer. The officer had, before questioning the prisoner, issued the "usual and proper caution". The court, nevertheless, ruled that "where a constable arrests a party he ought to abstain from asking questions."⁴⁶ The judgment demonstrates that the unauthorised acquisition by the police of competence over the interrogation of detained suspects met with a protracted resistance from some members of the judiciary.⁴⁷ In invoking the disciplinary principle implicit in the exclusionary rule,⁴⁸ the court made clear that the police officer had no authority to question suspects in custody, "he ought to leave that duty to the magistrate, who alone has the power to reduce to writing what is said by the prisoner."⁴⁹

⁴³ Cross, 1970, p.67; Neasey, 1977 p.360.

⁴⁴ See *Ibrahim* (1914) AC 599, pp.611-12; Oaks, 1970, p.722; Mirfield, 1985, pp.70-4.

⁴⁵ *Bodkin* (1863) 9 Cox C.C. 403.

⁴⁶ *Ibid.*

⁴⁷ See also *Hassett* (1861) 8 Cox C.C. 511.

⁴⁸ MacDonald and Hart, 1947, pp.825-6.

⁴⁹ *Bodkin* (1863) 9 Cox C.C. 403.

In *Gavin*⁵⁰ the accused, while in police custody, made a statement admitting his own guilt and implicating two others. When the others were taken into custody they denied all knowledge of the offence with which they were charged. Subsequently they were confronted with Gavin and his statement was read over to them, whereupon they made incriminatory statements. Smith, J refused receive the statement of Gavin against the two prisoners saying:

When a prisoner is in custody the police have no right to ask him questions. Reading a statement over, and then saying to him "What have you to say?" is cross-examining the prisoner and therefore I shut it out. A prisoner's mouth is closed after he is once in given in charge, and he ought not to be asked anything. A constable has no more right to ask a question than a judge to cross-examine.... Before the prisoner is charged or is in custody he may be asked what he has to say in explanation or in answer to the charge.⁵¹

Thus for Smith, J the privilege afforded to suspects against compulsory self-incrimination was not to be infringed by questions put to them by any officer of state interested in the criminal process, including the lesser office of police constable, once the suspect is charged or taken into custody. An element of ambiguity, however, arises in the paradoxical suggestion that the suspect might be properly questioned by the police after he has been charged in respect of the offence on which he is charged.⁵²

A note to the report of the case observes that the decision in *Gavin* conflicts with the leading authorities as to the reception of confessions obtained in answer to questions. It points out that on those authorities only inducements relating to the immediate charge could prevent a confession from being admitted in evidence against its author. However, the note is clear in its conclusion that "the judges are by no means unanimous in their decisions and all of them express disapproval of the practice while admitting its technical accuracy".⁵³ The note also appears to warn that the ruling of Smith, J should not be regarded as an aberration since it states that *Gavin* "must be taken to be a considered opinion, and as affording guidance for the future".⁵⁴ That guidance was, presumably,

⁵⁰ *Gavin* (1885) 15 Cox C.C. 656.

⁵¹ *Ibid.*, p.657.

⁵² See *Wong Chiu Kwai* (1909) 3 HKLR 89, p.95.

⁵³ *Gavin* (1885) 15 Cox C.C. 656, p.657. In this regard see, for example, *Thornton* (1824) 1 Moo. 27; *Wild* (1835) 1 Moo. 452; *Kerr* (1837) 8 C. & P. 177.

⁵⁴ *Gavin*, *ibid.*, p.657.

intended to inform the police of what the courts regarded as the border between acceptable and improper investigative practice and to give notice of a judicial preparedness to reinforce that guidance by excluding evidence obtained in contravention of it.

In the 1893 case of *Brackenbury*⁵⁵ Day, J expressly dissented from the decision in *Gavin* when he admitted statements made by the accused in answer to police questions which were made prior to the accused being taken into formal custody. This again permits the conclusion that the judiciary did not share a unitary attitude either to the scope and function of the exclusionary rule, or to the legitimate compass of criminal investigations when conducted by the police, as these features related to and impinged upon the protection of the individual from compulsory self-incrimination.⁵⁶

Thus, in the same year as *Brackenbury*, Cave, J, in the case of *Thompson*,⁵⁷ after having affirmed that it was the duty of the prosecution to show that confessions adduced in evidence were free and voluntary, expressed a distrust of confessions supposed to have been the offspring of free will and yet were repudiated by the prisoner at his trial. As he put it:

It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with a desire born of penitence and remorse, to supplement it with a confession, and this desire again vanishes as soon as he appears in a court of justice.⁵⁸

That Cave, J was critical of any invasion upon the privilege against compulsory self-incrimination and of the police practice of interrogating suspects in custody was confirmed in *Male and Cooper*⁵⁹ also decided in 1893. In this case the only witness called for the prosecution stated that she had been told by a police inspector that she had better tell the

⁵⁵ *Brackenbury* (1893) 17 Cox C.C. 628.

⁵⁶ See also *Best* (1909) 1 KB 692, where the contention that prisoners should not be questioned in custody was rejected by Alverstone, CJ, sitting with Channell and Walton, JJ, who suggested that a "prisoner is *entitled* to give an explanation" and that such questioning might afford the prisoner an opportunity to do so. (Emphasis supplied.) The judges felt that *Gavin* was "not a good decision" and that its statement of the law was too wide.

⁵⁷ *Thompson* (1893) 17 Cox C.C. 641.

⁵⁸ *Ibid.*, p.674.

⁵⁹ *Male and Cooper* (1893) 17 Cox C.C. 689. See also the judgment of Cave, J in *Morgan* (1895) 59 JP 827.

truth and that if she did not, she would be prosecuted in connection with an illegal operation said to have been performed upon her. Cooper was subsequently arrested under a warrant relating to a similar charge. While being taken into formal police custody, Cooper was cautioned by the inspector and informed of the statement made by the witness. At the request of Cooper, the statement was read over to her. Cave, J considered her reply to be inadmissible on the ground that "the police had no right to ask questions, or to seek to manufacture evidence."⁶⁰ The judge observed that it was "quite right" for the police, when taking a person into custody, to charge them "but the prisoner should be previously cautioned, because the very fact of charging induces a prisoner to make a statement and he should have been informed that such a statement may be used against him."⁶¹

Cave, J seems, therefore, to have considered that while the voluntariness rule presupposes the free will of the suspect, custodial questioning, without a caution, constitutes such an impairment of mental freedom that ensuing statements could not be regarded as voluntary.⁶² It may be doubted whether the caution actually had the properties he and other judges ascribed to it.⁶³ However, his judgment, as his concluding remarks indicate, was also couched in terms intended to discipline the investigatory practices of the police:

The law does not allow the judge or jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and the produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners.... It is no business of a policeman to put questions, which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies. I do not intend these remarks to apply only to this case....⁶⁴

⁶⁰ *Male and Cooper, ibid.*, p.690.

⁶¹ *Ibid.*

⁶² Compare the ruling of Hawkins, J in *Miller* (1895) 18 Cox C.C. 54, p.55.

⁶³ See Brownlie, 1960, p.307; Williams, G., 1961, p.50.

⁶⁴ *Male and Cooper* (1893) 17 Cox C.C. 689, p.690.

Thus, as far as Cave, J was concerned, the police should respect the due process freedoms granted by the courts to individuals at each stage of the criminal justice process against compulsory self-incrimination.

Five years after this decision, Russell, CJ in *Rogers v. Hawkin*,⁶⁵ felt it necessary to correct any impression that Cave, J might have given to suggest that, as a general proposition of law, a statement made to a policeman by a suspect who has not been previously cautioned and who has not been induced to make that statement by threats or promises, is legally inadmissible.⁶⁶ In the opinion of the judge there was "no rule of law excluding statements made under such circumstances, and such a rule would be most mischievous and a hardship upon a falsely accused person. The statement of an innocent person may be most valuable to exculpate him."⁶⁷

Although the observations of Russell, CJ are articulated in terms which appear to display concern for the falsely accused, the import of his essentially pro-crime control remarks implicitly shifts the assessment of the guilt or innocence of the suspect from the courts to the investigative stage of the prosecution process. Thus, his attempt to circumscribe the interpretation of voluntariness suggested by Cave, J in *Male and Cooper*, and to re-impose a narrow definition of the voluntariness requirement, worked to further legitimise and facilitate the crime control mandate of police investigations.

The criticism of *Male and Cooper* by Russell, CJ illustrates that throughout the nineteenth and early twentieth centuries some judges felt obliged to counter what may have been perceived as the unorthodox rulings of some of their incorrigible colleagues. Nonetheless, the polarity of judicial opinion respecting the function of the voluntariness rule was a result of views held by individual members of an, as yet, relatively unincorporated and unintegrated judiciary. This in turn led to decisions that suggested that the exclusionary rule, which was itself posited upon a vaguely defined legal conception of voluntariness, was of questionable applicability to the progressive encroachment of the "new" police as an unprecedented embodiment of the social and crime control interests of the modern industrial capitalist state.

The exclusionary rule was formulated towards the end of the eighteenth-century⁶⁸ and the leading decision of *Ibrahim*,⁶⁹ in 1914, re-affirmed the narrow legal concept of

⁶⁵ *Rogers v. Hawken* (1898) 62 JP 279.

⁶⁶ *Ibid.*, p.280.

⁶⁷ *Ibid.*, 67 LJQB 526, p.527.

⁶⁸ See *White's Case* (1741) 17 How.St.Tr. 1079; *Rudd* (1775) 1 Leach. 115; *Warickshall* (1783) 1 Leach. 263; *Cass* (1784) 1 Leach. 293.

voluntariness as its underlying rationale. However, from its inception, before the development of modern professional police forces,⁷⁰ through to the early twentieth-century, the requirement of voluntariness - in spite of that aspect of its historical origins that related to the protection of individual citizens from the power of state organs to compel individuals to incriminate themselves - failed to adequately accommodate the investigative methods of the "new" police. Consequently, some judges, either in the exercise of their discretion or by extending the voluntariness rule, excluded evidence obtained by what was considered to be unacceptable police practices.⁷¹ Thus, in the 1898 decision of *Histed*,⁷² where the prisoner, held in police custody, was questioned without being cautioned, Hawkins, J instantly rejected the evidence obtained, saying:

It is a matter on which I hold a strong opinion. No one, either policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with.... In my opinion, when a prisoner is once taken into custody, a policeman should ask no questions at all without administering previously the usual caution.⁷³

As Hawkins, J implied that such questioning could be legitimately conducted if it followed a caution, it may be concluded that by the end of the nineteenth-century the police, and police interrogations, had acquired a greater, though perhaps qualified, degree of legitimacy in the eyes of even their strongest judicial opponents. A note to the case states that when the decisions of *Gavin*⁷⁴ and *Brackenbury*⁷⁵ were subsequently brought to the attention of Hawkins, J he said: "I entirely agree with the ruling of Smith, J in *Reg. v. Gavin*. Cross-examination of a prisoner by a policeman should not be permitted, and in my discretion I should exclude evidence obtained in that way. The case I have just tried shows

⁶⁹ *Ibrahim* (1914) AC 599.

⁷⁰ See Neasey, (1977, p.362) who argues that by as late as "1832 the police force as we know it was in swaddling clothes."

⁷¹ See Neasey *ibid.*, who points out that even after "120 years or so of experience of questioning of suspects by the police [the common law has not been able] in its pragmatic way to produce any coherent body of law which attempts to regulate police investigatory power, but only a formless and somewhat imprecise combination of rules."

⁷² *Histed* (1898) 19 Cox C.C. 16.

⁷³ *Ibid.*, p.17.

⁷⁴ *Gavin* (1885) 16 Cox C.C. 656.

⁷⁵ *Brackenbury* (1893) 17 Cox C.C. 628, which expressly dissented from *Gavin*.

exactly the danger of allowing such evidence to given."⁷⁶ It is noteworthy that Hawkins, J elected to invoke his unreviewable discretion to exclude the evidence elicited under police questions, rather than to attempt to extend the voluntariness rule, as defined by the leading authority of *Baldry*,⁷⁷ which required the judge to exclude confession evidence only in circumstance where a promise or a threat had been used to procure it.

This judicial discretion was also employed to exclude technically admissible confession evidence, under the narrowly drawn voluntariness test, in the case of *Knight and Thayre*.⁷⁸ A detective had questioned the two prisoners, after cautioning them, for some six hours during which time, the detective admitted, he would not allow Knight to leave the room alone. He also stated that he did not have sufficient evidence for a prosecution at the beginning of the interview, though he did not necessarily intend to obtain a confession. It was shown that after two hours of questioning, Knight began to make "compromising statements" which the prosecution sought to submit in evidence. It was objected that the "protracted cross-examination" brought such pressure to bear on the mind of the accused that his statements could not be regarded as being voluntary. Channell, J⁷⁹ in excluding the evidence, appears to have vacillated between whether he should base his decision on the ground that the prolonged questioning had impaired the voluntariness of the statement or to exclude the evidence in the exercise of his discretion. He found that it was "not easy to extract from the cases what is the guiding principle underlying the matter." However, he felt that the authorities indicated that a law enforcement officer "may question persons most likely to able to give him information" whether or not such persons are suspected, provided he has not already determined to take them into custody. Once the officer has decided to charge and take a person into custody, he should not question the prisoner.⁸⁰ Channell, J then observed that:

A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.⁸¹

⁷⁶ *Histed* (1898) 19 Cox C.C. 16, p.17. The reporter appears to have closed his quotation of Hawkins, J prematurely.

⁷⁷ *Baldry* (1852) 2 Den. 430, p.443.

⁷⁸ *Knight and Thayre* (1905) 20 Cox C.C. 711.

⁷⁹ Channell, J sat with Alverstone, CJ and Walton, J in *Best* (1909) 1 KB 692; 25 LTR 280, which was critical of *Gavin* (1885) 15 Cox C.C. 689.

⁸⁰ *Knight and Thayre* (1905) 20 Cox C.C. 711, p.713.

⁸¹ *Ibid.*

The judge accepted the rule that a confession must be shown to have been voluntarily given before it could be received in evidence, though he was not prepared to accept it as a "universal rule" since the admissibility of a confession "must to some extent depend on the facts of the particular case."⁸² He then adverted to his discretion to exclude otherwise admissible evidence, saying:

I am not aware of any distinct rule of evidence that if ... improper questions are asked the answers to them are inadmissible, but there is clear authority for saying that the judge at trial may in his discretion refuse to allow the answer to be given in evidence and in my opinion that is the right course to pursue.⁸³

In indicating that the distinction the recent authorities had erected - between the unsanctioned custodial interrogation of suspects as to their guilt and the permissible non-custodial questioning of individuals who might provide information to guide criminal investigations - was so tenuous as to leave the police free to interrogate suspected persons before they had been cautioned, arrested, and taken into formal custody, Channell, J also stated:

I cannot help thinking that in the case of a person not already a prisoner, or at any rate accused, there must something which might possibly induce him to make an untrue confession, otherwise it is difficult to see any satisfactory reason for rejecting the evidence.⁸⁴

It seems, therefore, that for Channell, J the judicial discretion to exclude confession evidence was to be activated where technically admissible evidence (that is, evidence not induced by specific promises or threats) was obtained in violation of the proscription against any questioning designed to extract self-incriminatory admissions, irrespective of the location of that questioning.

In 1908, the Full Court of the Supreme Court of Hong Kong reviewed in detail the English authorities relating to the admissibility of confessions. The case of *Wong Chiu Kwai*⁸⁵ was reserved for the Full Court upon the admissibility of certain real and confession evidence elicited by police questions regarding an alleged murder. Giving the leading judgment, Alverstone, LCJ outlined the law with regard to the voluntariness rule.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, pp.713-14.

⁸⁵ *Wong Chiu Kwai* (1908) 3 HKLR 89.

He then addressed the question of how far the law applied to confessions made to police constables. In his view confessions made to police officers before charge were to be distinguished from those made after arrest and charge.⁸⁶ For Alverstone, LCJ the authorities made clear that any statement made to a police officer by an individual before he is charged was receivable in evidence, if free from explicit inducements. This was so even if that statement was elicited by questions, since those authorities suggested a policeman may ask questions of a suspect before he is taken in custody. Recognising that the authorities were inconsistent and, therefore, did "not bring the dividing line into very clear prominence", Alverstone, LCJ added:

I cannot honestly say that I believe this to be the law; but it is the only statement which reconciles all the decisions.⁸⁷

However, he also thought that the law prohibiting the use of inducements was applicable to police officers who, for the poor and ignorant who were most frequently drawn into the criminal justice process, embodied the threat of the law whether before or after the suspect was taken into formal custody.⁸⁸

Alverstone, LCJ abstained from employing his discretion to exclude the confession in favour of its exclusion under an extended construction given to the voluntariness rule as he concluded:

I am clearly of the opinion that for three or four policemen to go into a man's bedroom at 5 *a.m.* and wake him up, and ask him questions, which were intended to and did, make him incriminate himself is an undoubted act of violence, and that the statements made by him in the circumstances are not voluntary, and are therefore inadmissible.⁸⁹

The rules governing the admissibility of confession evidence restricted the exclusionary powers of judges to circumstances in which the confession was made in consequence of specific threats or promises of a temporal nature. Nevertheless, for Alverstone, LCJ the conduct of the police in questioning the accused before he was formally arrested and taken into custody undermined his privilege against compulsory self-incrimination. Thus, in

⁸⁶ *Ibid.*, pp.94-5.

⁸⁷ *Ibid.*, p.98.

⁸⁸ *Ibid.*, pp.98-99.

⁸⁹ *Ibid.*, p.100.

spite of there being no evidence that the confession resulted from the operation of the inducements as contemplated by the conventional exclusionary rule, as laid down in *Baldry*,⁹⁰ the confession was excluded under a broadened interpretation of that rule as being involuntary.

Compertz, J declared he had also found difficulty in applying the authorities to the varying circumstances of individual cases because "many of the most recent decisions seem to conflict with each other, and the text books after stating generally the broad principles of the law as the learned authors conceive it, content themselves with marshalling conflicting cases on either side of the line."⁹¹ After determining that the evidence suggested no express promise or threat was used by the police, Compertz, J agreed that the confession was nonetheless involuntary and inadmissible. He felt that while the law allowed the prisoner to speak before a judge or magistrate, the accused was not to be compelled to do so. The formal caution was intended to make clear to the prisoner that any "perfectly spontaneous" statement he might make can be used against him.⁹² However the law did not permit any person in authority to interrogate a prisoner.⁹³ It is clear, he argued, that the police were subordinate officers of public justice. He then expressed his "great difficulty" in accepting that such officers "may obtain evidence out of the prisoner's mouth in a manner of which the Court disapproves, and thinks worthy of censure, and that such evidence may be used at the trial against the person who has furnished it."⁹⁴

In a statement suggesting that some of the authorities had failed to incorporate their own due process rhetoric to enforce the prohibition against police interrogations calculated to draw from the suspect such incriminatory evidence that would sustain a conviction, Compertz, J remarked:

If the law really allows such statements to be obtained, and the Courts though disapproving, admit them as proof of guilt it cannot be blameable for a policeman to obtain them. He may, if the protests

⁹⁰ *Baldry* (1852) 2 Den. 438.

⁹¹ *Wong Chiu Kwai* (1908) 3 HKLR 89, p.107.

⁹² *Ibid.*, pp.107-09.

⁹³ *Ibid.*, p.107-8, the Judge expressly isolated "the special provisions" of the Criminal Evidence Act, 1898.

⁹⁴ *Ibid.*, p.110.

from the Bench have any weight - be endangering his own professional prospects; but he can conscientiously feel that he is promoting the cause of justice and the safety of the public.⁹⁵

Finally, Compertz, J was satisfied that the confession was made involuntarily and that the suggested distinction between confessions made when the suspect is, as opposed to when he is not, under arrest or in custody "lack[ed] actuality."⁹⁶ It would seem that the judge considered the courts bore the responsibility for the "illegal" interrogative practices of the police since the courts had failed to endorse the due process rhetoric with the exclusion of evidence obtained in violation of that rhetoric. In this instance the judge made clear that he was not suggesting that the police meant to act unfairly or illegally. He felt that they were "merely doing what ... many police officers do in similar circumstances ... not even thinking that the prisoner's answer might be used at the trial."⁹⁷ It may be objected, however, that his criticism of the failure of the law to incorporate its own rhetoric leaves out of consideration the ability of the police to exploit the divergence between the rhetoric of the law and the reality of the crime control imperatives of the law.

Conclusion

An examination of the nineteenth century authorities concerned with the exclusion of extra-judicial statements made by accused persons, unless proved to the satisfaction of the trial judge to have been made "voluntarily", reveals a fundamental divergence of judicial opinion as to the legally understood scope and application of the concept of voluntariness.

As the judicial practice of rejecting confessions deemed to be involuntary hardened into a firm rule of law towards the end of the eighteenth century,⁹⁸ and as that rule operated throughout the nineteenth century, two opposing interpretations of the legally accepted requirement of voluntariness vied for ascendancy. The two contrasting conceptions of the requirement were brought into particularly sharp focus with the growth of the practice of

⁹⁵ *Ibid.*, p.110; see also p.112.

⁹⁶ *Ibid.*, pp.112-13.

⁹⁷ *Ibid.*, p.112.

⁹⁸ See *Rudd* (1775) 1 Leach 115; *Warickshall* (1783) 1 Leach 263; *Thompson* (1783) 1 Leach 291; and *Cass* (1784) 1 Leach 263.

the newly professionalised police forces obtaining confessions from suspects detained in custody.⁹⁹

The two interpretations can be readily distinguished on the basis that one is indicative of a broad approach towards the legal doctrine of voluntariness, while the other is inclined towards a narrow approach. On the one hand, then, the broad approach pressed for a consideration of the wider circumstances, beyond the force of threats and promises, in which an extra-judicial confession was allegedly made. Thus, such factors as the inherently compelling pressures of the investigatory and prosecution process upon the accused, the strength of mind of the accused and the effect and legality of questions inviting incriminatory replies, were immediately relevant to the crucial issue of whether the mental freedom of the accused to volunteer a confession was impaired.

This approach suggests a judicial assessment of the subjective condition of the defendant, as suspect or accused, during the pre-trial phase of the prosecution process where, it was argued, the individual ought to be left entirely to himself to decide whether or not to make a statement.¹⁰⁰ Indeed, until the mid-nineteenth century case of *Baldry*,¹⁰¹ the broad view of the proper scope and application of the voluntariness test suggested that to caution a suspect that anything he might "freely" say whilst under investigation *may* or *would* be used against him at his trial,¹⁰² raised the possibility of the mind of the suspect being "improperly induced."¹⁰³

From this broad perspective the correct function of the voluntariness rule was restricted by the duty placed upon trial judges to ascertain whether the specific inducements of "threats" or "promises" had been employed to obtain the confession.¹⁰⁴ Fry argues that at

⁹⁹ *Ibrahim* (1914) AC 599, *per* Lord Sumner, p.610.

¹⁰⁰ *Green* (1832) 5 Car.& P 312 *per* Gurney, B. See also *Morton* (1843) 2 M & Rob. 514, p.515, *per* Coleridge CJ: "The prisoner's mind must be left entirely free"; *Garbet* (1847) 1 Den. 236, p.257 where Alderson, B suggested that evidence of an accused's confession must be excluded where "his liberty of refusing to say anything on the subject has been infringed." Also see *Baldry* (1852) 2 Den. 430, p.442, *per* Pollock, CB: "... it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not." Park, B in the same case, p.444, stated that "in order to render a confession admissible in evidence it must be *perfectly voluntary*." (Emphasis supplied.)

¹⁰¹ (1852) 2 Den. 430.

¹⁰² See *Wild* (1835) 1 Moo. 452, p.455; *Arnold* (1838) 8 Car. & P. 621. See also 11 & 12 Vict., c.42 (1848) s.18.

¹⁰³ See *Morton* (1843) 2 M & Rob. 514, p.515 and *Furley* (1844) 1 Cox C.C. 76. See also *Baldry* (1852) 2 Den. 430, particularly the arguments of counsel for the prisoner, and *Reason* (1872) 12 Cox C.C. 228, p.229, *per* Keating, J.

¹⁰⁴ See e.g. *Moore* (1852) 2 Den. 522, p.527, *per* Park, B: "Perhaps it would have been better to have held (when it was determined that the Judge was to decide whether the confession was voluntary), that in all

the outset these terms were intended "*not* for the purpose of placing a restriction upon the *kinds of inducements* which will render a statement not-voluntary within the meaning of the rule, *but* only for the purpose of placing a restriction on the *kinds of persons* whose inducements (of any kind) will render a statement non-voluntary."¹⁰⁵ The proscription against the inducements of threats or promises was, therefore, designed to indicate to trial judges that they should consider not only evidence of the subjective state of mind of the accused when the allegedly voluntary confession was made but also to point out that they should be aware that a "person in authority" was often peculiarly placed to influence the mental freedom of a suspect with improper inducements *such as* threats and promises.

Fry¹⁰⁶ also argues that the nineteenth century authorities which provided that the voluntariness test was limited to an assessment of the existence and operation of threats or promises upon a confession were founded upon a "misrepresentation" of the judgment delivered in the case of *Warickshall*,¹⁰⁷ where it was stated that:

... a confession forced from the mind by the flattery of hope, or by the torture of fear ... is rejected.¹⁰⁸

He maintains that a "heresy" evolved under the nineteenth century case law when the phrase "flattery of hope" was translated into "promises" and the phrase "torture of fear" was interpreted as referring to "threats", so that confessions were to be considered voluntary unless there was evidence that the specific inducements of threats or promises had acted upon the accused.¹⁰⁹ The broad view of the voluntariness requirement might, however, go so far as to suggest that in so far as there was a heresy, it was merely

cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement, and the character of the person holding it out.... But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, [the confession] cannot be received...."

¹⁰⁵ Fry, 1938, p.427.

¹⁰⁶ *Ibid.*, p.429.

¹⁰⁷ *Warickshall* (1783) 1 Leach. 263.

¹⁰⁸ *Ibid.*, at p.264.

¹⁰⁹ Fry, 1938, p.429. See, for example, *Thornton* (1824) 1 Moo. 27, p.28; *Spilsbury* (1835) 7 Car. & P 187, p.188, *per* Coleridge, J, "... to render a confession inadmissible, it must either be obtained by hope or fear"; *Scott* (1856) 1 D. & B. 47, p.58, *per* Campbell, LCJ: "It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises"; *Jarvis* (1867) 10 Cox C.C. 574, p.576, *per* Kelly, CB, "... we ought to see that no one is induced, either by a threat or a promise, to say anything of a incriminatory character against himself." See also *Regan* (1867) 17 LT 325 and *Miller* (1895) 18 Cox C.C. 54, p.55.

compounded by the nineteenth century case law that followed *Warickshall* which further restricted the categories of improper inducements to specific threats and promises.

The source of the heresy which evolved to challenge the "pristine purity" of the wide voluntariness test¹¹⁰ may be found within the leading authority of *Warickshall*¹¹¹ itself which failed to make clear that quite apart from an accusation by, or the suspicions of, a person in authority, other factors, including the subjection of suspected persons to extra-judicial incriminatory questioning, were capable of engendering the torture of fear or the flattery of hope so as to render a confession involuntary.¹¹² This failure enabled the proponents of the narrow view of the voluntariness test to construe what is generally regarded as the first case to lay down the contours of the exclusionary rule,¹¹³ as an authority for the proposition that only the inducements of threats or promises could invalidate an otherwise voluntary confession.

Implicit in this narrow construction of the test is the assumption that a person in authority, whether or not that person is a police officer, must act in some overt way to induce a suspect to confess.¹¹⁴ This assumption worked to further exclude any consideration by the trial judge of the psychological pressures beyond patent threats or promises that may act to impair the mental freedom of the accused.¹¹⁵

The nineteenth century case law indicates, however, that some judges continued to infuse the narrow construction placed upon the voluntariness test with a consideration of

¹¹⁰ Fry, 1938, p.429.

¹¹¹ In this regard it is noteworthy that while the court in *Warickshall* used language that appeared to restrict the categories of improper inducements to threats and promises, in the case of *Thompson* (1783) 1 Leach 291, p.293 Hotham, B suggested that the exclusionary rule required judges to reject confessions "unless they appear to have been made voluntarily and without *any* inducement." (Emphasis supplied.) See also *Moore* (1852) 2 Den. 522, pp.526-7, *per* Park, B.

¹¹² See, for instance, *Wilson* (1817) Holt. 597; *Tool* (1856) 7 Cox C.C. 244, *per* Richards, B: "From the mere circumstances of being in custody, the prisoner [is] not on equal terms with her interrogator."; *Johnston* (1864) 15 ICLR 60, p.90, *per* O'Brien, J: "The very fact of ... questions being put ... conveys to the prisoner's mind the idea of some obligation ... to answer them, and deprives the statement of that voluntary character which is essential to admissibility." *Per* Hayes, J (*ibid* p.80): "... the prisoner should have free will and power to speak, or refrain from speaking ... his will should not be warped by any unfair, dishonest, or fraudulent practises, to induce a confession." See also *Male and Cooper* (1893) 17 Cox C.C. 689, p.690, *per* Cave, J: "... the very fact of charging induces a prisoner to make a statement...."

¹¹³ Kaufman, 1979, p.18.

¹¹⁴ Ratushny, 1979, p.454.

¹¹⁵ See, for example, *Reason* (1872) 12 Cox C.C. 228, p.228 where Keating, J states that "[t]he real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth." See also *Ibrahim* (1914) AC 599, p.611.

the wider factors capable of inducing an involuntary confession.¹¹⁶ Increasingly, towards the end of the nineteenth century, as the narrow interpretation of the voluntariness requirement came to govern the admissibility of extra-judicial confessions,¹¹⁷ other judges began to invoke a discretion to exclude confession evidence which was technically admissible under the prevailing restrictive voluntariness test.¹¹⁸ Such judges were disposed to refuse to receive confessions that had been "either certainly or probably procured by a promise of good or a threat of evil."¹¹⁹ However, they were also prepared to reject confessions if they appeared "to have been extracted by ... pestering interrogatories, or made by the party to rid himself of importunity."¹²⁰ This is not to suggest that these judges were actuated by "absurd or dangerous sentimentalities",¹²¹ rather their broad yet legalistic interpretation of the voluntariness test drew upon the principle, enshrined in the maxim *nemo tenetur seipsum prodere*, that no one should be compelled to incriminate themselves. Indeed, it has been argued that the rule excluding involuntary confessions "grew out of" the privilege against self-incrimination.¹²² It followed, therefore, that evidence of a confession could not be considered "free and voluntary"¹²³ if the will of the accused, as suspect, to remain silent appeared to have been in any way overborne.¹²⁴

That the privilege against compulsory self-incrimination necessarily extended beyond judicial proceedings to the extra-judicial phases of the criminal justice process, as a

¹¹⁶ See *Gavin* (1885) 15 Cox C.C. 656; *Male and Cooper* (1893) 17 Cox C.C. 689; *Histed* (1898) 19 Cox C.C. 16; *Wong Chiu Kwai* (1908) 3 HKLR 89, p.100.

¹¹⁷ See *Brackenbury* (1893) 17 Cox C.C. 628; *Rogers v. Hawken* (1898) 19 Cox C.C. 122; *Booth and Jones* (1910) 74 JP 475; *Ibrahim* (1914) AC 599.

¹¹⁸ *Histed* (1898) 19 Cox C.C. 16; *Knight and Thayre* (1905) 20 Cox C.C. 711. See also *Ibrahim* (1914) AC 599, p.614, *per* Lord Sumner: "Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it."

¹¹⁹ *Johnston* (1864) ICLR 60, p.83.

¹²⁰ *Ibid.*

¹²¹ 3 Wigmore, 1970, pp.298-301.

¹²² Levy, 1968, p.495. See also Lidstone and Early, 1982, p.501.

¹²³ *Thompson* (1893) 2 QB 12; 17 Cox C.C. 641.

¹²⁴ See Fry, 1938, p.431; *Gavin* (1885) 15 Cox C.C. 656; *Male and Cooper* (1893) 17 Cox C.C. 698; *Histed* (1898) 19 Cox C.C. 16; *Knight and Thayre* (1905) 20 Cox C.C. 711; *Wong Chiu Kwai* (1908) 3 HKLR 89.

safeguard against involuntary and unreliable confessions, was acknowledged by Wigmore when he explained that:

The real objection is that any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, - that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately the innocent are jeopardized by the encroachments of a bad system.¹²⁵

In contrast to the broad construction some judges were prepared to place upon the requirement of voluntariness - a construction which suggested threats and promises were but illustrations of improper inducements - the narrow and, by the early twentieth century, ultimately dominant view of the requirement¹²⁶ inclined to the position that psychological pressures attending accusation, arrest and detention in custody, even when combined with the operation of incriminatory questioning by the custodian, could not, without some evidence of threats or promises having been held out, exclude a confession as having been involuntarily made.¹²⁷

As a direct consequence of the restrictive approach to the concept of voluntariness, a dissonance between the rhetoric of the law and the practice of the law evolved. The rhetoric of the law pursuant to the exclusionary rule suggested a requirement of voluntariness that rested upon a postulate of free will¹²⁸ and, therefore, appeared to require

¹²⁵ 8 Wigmore, 1961, p.296 n.1. This comment, it should be noted, would seem to militate somewhat against his own contention that the exclusionary rule and the privilege are separate and independent in both origin and function (8 Wigmore, 1961, pp.400-2; 3 Wigmore, 1970, p.338). For the view that these principles were indissolubly linked see McCormick, 1938, pp.452-55; Levy, 1968, pp.327-8, 495-7.

¹²⁶ See *Ibrahim* (1914) AC 599, pp.609-14.

¹²⁷ 3 Wigmore, 1970, p.502; *Johnston* (1864) 15 ICLR 60, pp.84-5, *per* Hayes, J; *Jarvis* (1867) 10 Cox C.C. 574, p.576; *Regan* (1867) 17 LT 325; *Brackenbury* (1893) 17 Cox C.C. 628; *Hirst* (1896) 18 Cox C.C. 374; *Rogers v. Hawken* (1898) 19 Cox C.C. 122; *Booth and Jones* (1910) 5 Cr.App.R. 177. See also *Ibrahim* (1914) AC 599, p.609, *per* Lord Sumner: "... no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

¹²⁸ See *Wilson* (1817) Holt. 597, *per* Richards, LCB; *Morton* (1843) 2 M & Rob. 514, p.515, *per* Coleridge, CJ; *Pettit* (1850) 4 Cox C.C. 164, p.165, *per* Wild, CJ; *Baldry* (1852) 2 Den. 430, p.446, *per*

a judicial assessment of all potentially coercive factors attending the extra-judicial or pre-trial phases of the criminal justice process. In practice, however, the concept of voluntariness, as understood by "the balance of decided authority",¹²⁹ had shifted from one which laid stress upon a pre-trial articulation of the privilege against compulsory self-incrimination (the right to silence) as the fundamental consideration against which the voluntariness of a confession should be tested,¹³⁰ to one which provided a niche in which the police practice of interrogating suspects in custody could develop to become progressively legitimized by the courts during the twentieth century under the Judges' Rules.¹³¹

Campbell, LCJ; *Mick* (1863) 3 F & F 322, *per* Mellor, J; *Jarvis* (1867) 10 Cox C.C. 574, p.576, *per* Kelly, CB; *Histed* (1898) 19 Cox C.C. 16, p.17, *per* Hawkins, J. See also Grano, 1979, p.879.

¹²⁹ *Ibrahim* (1914) AC 599, p.614, *per* Lord Sumner.

¹³⁰ See, for example, *Green* (1832) 5 Car. & P 312, *per* Gurney, B; *Johnston* (1864) 15 ICLR 60, p.83, *per* Hayes, J; *Jarvis* (1864) 10 Cox C.C. 574, p.576, *per* Kelly, CB; *Gavin* (1885) 15 Cox C.C. 656, p.657, *per* Smith, J; *Histed* (1898) 19 Cox C.C. 16, p.17, *per* Hawkins, J.

¹³¹ Designed to regulate police practice with respect to the taking of statements from suspects, the first Judges' Rules were formulated by the Home Office in collaboration with the judges of the King's Bench in 1912. Though later amplified and revised the Rules remained in force until they were replaced by provisions issued pursuant to the Police and Criminal Evidence Act, 1984. The development and operation of the Judges' Rules are discussed in chapter 8.

CONFESSIONS IN THE PRE-20TH CENTURY CRIMINAL PROCESS: A BROAD VIEW

Introduction

In the previous chapter it was observed that the nineteenth century authorities relating to the exclusion of extra-judicial confessions exhibit an absence of judicial consensus regarding both the scope of the voluntariness test and its application to statements elicited from suspects detained and questioned by the police. Although that construction of the voluntariness test which was essentially permissive of police interrogations prevailed by the end of the century, the case law reveals that some judges, in their efforts to circumscribe the interrogation practices of the police, continued to accord the legal concept of voluntariness an extended meaning.

The contrasting judicial views on the scope and application of the voluntariness test may be understood as reflecting differing conceptions of the legitimate means through which confession evidence might be secured and, indeed, of the propriety and legality of custodial interrogations conducted by the police. Moreover, they may also be seen as reflecting competing perspectives on the guiding principles, functions and objectives which underpin and legitimate the criminal process. It is useful, therefore, to situate not only the opposing perspectives evident in the nineteenth century authorities but also other pre-twentieth century developments relating both to the structure of the criminal process and to the place in that process of confession evidence within the analytical framework erected by Herbert Packer¹ in his attempt to lay bare the foundational ideological assumptions and value systems upon which the criminal justice process rests.²

¹ Packer, 1964 and 1968.

² Packer, 1964, p.5.

Packer's Models

Although Packer composed his thesis against the background of twentieth century trends in the American criminal justice process, the analytical framework he employed may be deployed to appraise the historical tensions underlying the use of power within the English criminal justice process, to assess manifestations of those tensions as they evolved and impacted upon the custodial questioning of suspects by the police.

The heuristic device advanced by Packer rests upon two poles and the continuum that exist between them. The continuum comprises the "spectrum of choices",³ value systems⁴ and assumptions⁵ embraced by the criminal justice process. The poles represent the two separate and relatively antagonistic extremes of that continuum of value systems.⁶ Packer proposed a theoretical construct consisting of two models (the Crime Control Model and the Due Process Model) to characterise the polarized extremes of this continuum. He pointed out, however, that these normative models were not intended to be prescriptive. "Rather, they represent an attempt to abstract two separate value systems that compete for attention in the operation of the criminal process."⁷ His Crime Control and Due Process Models, therefore, epitomise the opposing ends of the continuum of values and ideologies that are subsumed within and work to fix the shape of "the complexes of activity that operate to bring the substantive law of crime to bear (or to avoid bringing it to bear) on persons who are suspected of having committed crimes."⁸

³ *Ibid.*, p.2.

⁴ *Ibid.*, p.5.

⁵ *Ibid.*, p.7.

⁶ *Ibid.*, p.6.

⁷ *Ibid.*, p.5.

⁸ *Ibid.*, p.2.

The Models and their Animating Values

The Crime Control Model is based upon a value system that maintains "that the repression of criminal conduct is by far the most important function to be performed by the criminal process."⁹ The efficiency with which the criminal process operates is a core concern of this model which "in order to operate successfully, must produce a high rate of apprehension and conviction" and must, therefore, place "a premium on speed and finality."¹⁰ Speed is promoted by maximizing the informal and routine elements of the process, while finality is fostered by minimizing the occasions upon which the process may be subject to challenge.

Under this model, the criminal justice process is similar to "an assembly line or a conveyor belt",¹¹ with each successive stage of that process performing routinized functions, the success of which is gauged by its ability "to pass the case along to a successful conclusion ... as expeditiously as possible".¹²

The early determination of guilt or innocence is crucial to the Crime Control Model of the criminal process, it therefore places great reliance upon a presumption of guilt to enable it "to deal efficiently with large numbers."¹³ By means of this presumption the "guilty" can be quickly passed through the remaining stages of the process.¹⁴ The presumption of guilt allows the non-adjudicative, preliminary and informal stages of the criminal justice process to achieve the "dominant goal" of the crime control model, the repression of crime through highly efficient and summary procedures.¹⁵ Under this model the preliminary and generally non-public, phases of the criminal process, operated by law enforcement or prosecution officials, provide "adequate guarantees" of reliable fact-finding. Accordingly, the subsequent phases of the process, particularly those of a formal adjudicatory nature, are seen as "unlikely to produce as reliable fact-finding as the expert administrative process that precedes them."¹⁶ An enduring theme of the Crime Control

⁹ *Ibid.*, p.9.

¹⁰ *Ibid.*, p.10.

¹¹ *Ibid.*, p.11.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p.13.

¹⁶ *Ibid.*

Model, therefore, is the desire "to place as few restrictions as possible on the character of the administrative factfinding processes and to limit restrictions to those that enhance reliability."¹⁷

Finally, the guilty plea is central to this model. It exists as a focal point for the early administrative fact-finding machinery and, when procured, serves to vindicate its inherent presumption of guilt. With the early conformation of presumed guilt, the subsequent stages of the process are left to perform the largely ceremonial role of endorsing the presumption of guilt and legitimating it as legal guilt. Therefore, the extent to which the successive stages of the process permit challenges to the informal and efficient fact-finding process, those stages are "relatively unimportant and should be truncated as much as possible."¹⁸

In contrast to the assembly line analogy drawn in respect of the Crime Control Model, its rival,¹⁹ the Due Process Model, is likened to an obstacle course.²⁰ The successive phases of the criminal justice process under this model are "designed to present formidable impediments to carrying the accused any further along in the process."²¹

Because the ability of the state, through the criminal law, to subject the individual to its coercive powers is always open to abuse "the criminal process must ... be subjected to controls and safeguards that prevent it from operating with maximal efficiency."²² Accordingly, the essentially "antiauthoritarian"²³ approach of the Due Process Model emphasises the concept of "legal guilt", as distinct from "factual guilt", and its corollary, the presumption of innocence. An individual is to be held guilty of a crime only by an impartial tribunal having competence to determine legal guilt.²⁴ The presumption of innocence, therefore, seeks to provide a safeguard against the conviction of the factually innocent since the courts and not the informal non-adjudicative organs of the criminal process have the responsibility of determining whether an accused person is legally guilty. Any presumption of guilt, therefore, has to be tested and proved against the accused on the

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p.14.

²⁰ *Ibid.*, p.13

²¹ *Ibid.*

²² *Ibid.*, p.16.

²³ *Ibid.*

²⁴ *Ibid.*, pp.16-17.

basis of admissible evidence in an adjudicative and adversarial context.²⁵ Thus, the presumption of innocence "serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual."²⁶

The Due Process Model, therefore, is concerned that each successive stage of the criminal justice process provide limits on the power of the state to act on individuals with "maximal efficiency" or indeed "maximal tyranny."²⁷ However, as Packer indicates, the values underpinning the Due Process Model are not to be regarded as the converse of those espoused by the Crime Control Model, in the respect that the former "does not deny the social desirability of repressing crime."²⁸ Like the Crime Control Model, this Model also emphasises the need for a reliable fact-finding process, however, it rejects the idea that this should be attained under informal, non-adjudicative processes. Rather it insists upon formal adjudicative fact-finding processes, which accept the possibility of error and allow the case constructed against the accused to be publicly evaluated by an impartial tribunal.²⁹

Applying the models advanced by Packer to the nineteenth century authorities concerned with the admissibility of confession evidence and the propriety of police interrogations, it may be seen that the narrow view of the voluntariness test can be situated toward the crime control end of the spectrum of value choices.³⁰ Conversely, the broad view, would seem to have more in sympathy with due process considerations.³¹

That said, the Models proposed by Packer are of value not only for the purpose of characterising the competing judicial approaches to the administration and operation of the voluntariness test during the nineteenth century, they may also serve as a device with which to trace general trends within the evolution of the criminal justice process.

²⁵ *Ibid.*, p.17.

²⁶ *Ibid.*

²⁷ *Ibid.*, p.16.

²⁸ *Ibid.*, p.13.

²⁹ *Ibid.*, p.14.

³⁰ See dicta of Park, J and Earle, J in *Baldry* (1852) 2 Den. 430, p.445 and p.446, suggesting the guilty unduly benefitted from a wide interpretation of the exclusionary rule. Also see the majority rulings in *Johnston* (1864) 15 ICLR 60, particularly pp.77-8 and 80 *per* Deasy, B; p.129 *per* Monahan, CJ; and p.85 *per* Hayes, J. See also *Miller* (1895) 18 Cox C.C. 54, p.55; *Booth and Jones* (1910) 5 Cr.App.R. 177, p.179.

³¹ See *Swatkins* (1834) 4 Car. & P 548; *Berriman* (1854) 6 Cox C.C. 388; *Mick* (1836) 3 F & F 322; the minority decisions in *Johnston* (1864) 15 ICLR 60; *Bodkin* (1863) 9 Cox C.C. 511; *Gavin* (1885) 15 Cox C.C. 656; *Male and Cooper* (1893) 17 Cox C.C. 689; *Histed* (1898) 19 Cox C.C. 16.

Confessions - Crime Control and Due Process Trends Between the 11th and 19th Centuries: An Overview

In tracing the pivotal role confessions have historically played in attaining sufficiently reliable declarations of guilt to justify and vindicate the right of the state to inflict punishments upon those found to have offended against its criminal code, one of the most salient and enduring features in the evolution of the administration of the criminal justice process in England is the incidence of the coercive power of the state and its ability to legitimate the conscription of individuals into the prosecution process in order to secure convictions. With a cursory review of the historical evidence through the models proposed by Packer, it becomes possible to identify tensions between the values that have come to be associated with due process and those that are comprised by the values of crime control as they have operated historically to shape the modern criminal process. Broadly, that historical evidence suggests that while due process considerations may have worked to dilute the extensive implementation of extreme crime control values, those values have nonetheless invariably been ascendant.

Put shortly, throughout its successive centuries of development an outstanding, pervasive and structural characteristic of the adversarial and accusatorial criminal process is its reliance upon the accused as the principal source of evidence against his or her self. This is seen most clearly in the use made of guilty pleas and putatively voluntary extra-judicial confessions, enabling it to efficiently expedite the treatment of criminal cases in ways that appear to employ the rhetoric of due process to legitimate practices essentially sympathetic to the considerations of crime control.³²

Immediately before the Norman invasion Anglo-Saxon England was composed of a number of localised and largely tribal social groupings whose principal unifying characteristic was the presence of Christianity, a remnant of the Roman occupation six centuries earlier.³³ With the development of centralised government from the second half of the eleventh century the Crown began to insist that personal wrongs be viewed as violations not against the interests of private individuals alone to be reconciled by those directly concerned, who might seek redress through private vengeance, but also infractions against the King and his peace.³⁴ Accordingly, rather than await the manifestation of the

³² See Goldstein, 1974, pp.1009-1025. On the status of confessions and guilty pleas from the perspectives of crime control and of due process, see Packer, 1964, pp.31-8; 46-50.

³³ Chambliss, 1969, p.2.

³⁴ 1 Pollock and Maitland, 1932, p.44; 2, 1968, pp.453-4.

will of God, it was felt that it was for the state to test and punish such infractions on behalf of the divine. The spiritual unity that had been established by the Church lent religious support to and gradually became subsumed under the social, political and crime control agenda of the Crown³⁵ which in order to absorb and replace Anglo-Saxon procedures and to enforce laws common to the realm, began to erect a system of royal justice.³⁶

As the Crown grew in strength it extended its influence in the various localities by means of its itinerant justices and lesser county-based officials. Under these royal officials the *inquisitio* procedure that had been employed to compel individuals to answer truthfully, and on oath, to inquiries mounted to protect the rights and revenues of the Crown, was gradually transformed into a crime control device that was almost totally reliant upon the participation jurors selected to represent the collective view of the community.

The importance of the jury in the administration of the incipient criminal law under the Crown stemmed from its dependence upon the community for information or evidence pertaining both to the circumstances of presented offences and to the character and credibility of persons presented.³⁷ Also, by drawing on the local community the Crown enhanced the role members of the village elite had traditionally played in Anglo-Saxon procedures and gained their assent to the new machinery of criminal justice.

By the Assize of Clarendon in 1166 and of Northampton in 1176, which together marked a major royal campaign against crime, the Crown in effect formalised a system of public accusation and prosecution which obliged the community to report offences and offenders, by presentment and indictment, to Church and Crown officials who collaborated to govern the proceedings under which those suspected of criminal activity were brought to the ordeal.³⁸ Hence, while accusations remained dependent upon private initiative, the interest of the Crown in the prosecution process and its growing lack of faith in the validity of verdicts secured by the ordeal were heavily represented.

The appearance of the petit jury coincided with the crisis of crime control brought about by the final repudiation and collapse of the customary modes of proof in the thirteenth century.³⁹ Thereafter, the indictment of the community - or more accurately, the

³⁵ See Jeffery, 1969, p.17.

³⁶ 2 Holdsworth, 1923, p.173.

³⁷ Waldman, 1959, pp.307-16.

³⁸ 2 Pollock and Maitland, 1889, pp.649-50.

³⁹ See Chapter 1, above.

indictment of the substantial freeholders and Knights from within the community⁴⁰ - it was felt, raised such a considerable presumption of guilt against the accused that it should be tried by the country.⁴¹

While the system of appeals, trial by battle and the ordeals were falling into disfavour and disuse, the presentment jury was gradually given the duty of testing its own accusations and of giving final verdicts.⁴² By the middle of the fourteenth century the accused was permitted to challenge any member of the trial jury who had previously served on the presentment jury.⁴³ This development marked the acceptance of what may be regarded as the due process principle that the jury that made the accusation should be distinguished from the jury charged to decide the facts at issue.⁴⁴ This concession to due process can be set in opposition to pure crime control considerations as outlined by Packer. However, it would seem that the legitimisation of the petit jury as the primary mode of adjudication necessitated the introduction of this due process principle.

The antecedence of the accusatory and adversarial criminal process may be discerned in this separation of function for accusations were made by the jury of presentment while the trial jury was charged to hand down its verdict in open court based not only upon its prior knowledge of the circumstances of the case but also upon its viewing of the confrontation between the accused and the officials representing the Crown.⁴⁵

The petit jury mode of trial which reflected both local and central interests,⁴⁶ therefore, emerged largely as an administrative expedient designed to secure proof of guilt more reliably than its predecessor.⁴⁷ For this, however, the consent of the suspect was required. Under the conceptions of due process extant at this time, the accused was given a right to refuse to recognise the mode of trial sanctioned by the authority of the Crown. It is clear,

⁴⁰ Green, 1988, p.396.

⁴¹ 1 Stephen, 1883, pp.256-62.

⁴² See Chapter 1, above.

⁴³ 25 Edw.3, 5., c.3. (1350)

⁴⁴ 1 Holdsworth, 1956, pp.324-5; Wells, 1911, pp.347-61.

⁴⁵ See Green (1985, pp.13-17) who argues that prior knowledge should not be confused with first-hand knowledge as it is doubtful whether the presenters, who were usually established figures in the local community, would have direct knowledge of criminal offences. However, they would have been well positioned to conduct inquiries into the rumours and suspicions that circulated in the wake of a crime.

⁴⁶ Hirst, 1986, p.31; Green, 1988, p.381.

⁴⁷ See Chapter 1, above.

however, that in practice this right was little more than a fiction. That accused persons who withheld their consent were made liable to be punished by *prisone (peine) forte et dure*⁴⁸ is again indicative of the crime control interest to the Crown of trying suspected or accused persons and whenever possible to coerce from them confessions of guilt. Though, by providing for the compulsion of non-consenting suspects and in particular the strongly suspected, the state was able to achieve almost universal "consent" to trial by jury as the common mode of adjudication.⁴⁹

One clear function of the jury, therefore, was to underpin and vindicate the jurisdiction of the state in the efficient repression of crime. The institution was also instrumental in inspiring a mixture of respect and fear in the lower orders with regard to the authority of the ruling elite to punish those convicted by the verdict of the community and, indeed, through the grant of Crown pardons, in advertising the merciful quality of royal justice.⁵⁰

Nevertheless, continued threats to the social and legal order established under the royal bureaucracy justified the further expansion of its influence through the rules and institutions of the criminal law. Furthermore, its efforts to combat what were perceived as epidemics of lawlessness throughout Medieval England⁵¹ operated as a profitable source of royal revenue.

From the late thirteenth and early fourteenth centuries legislative attention became increasingly directed to ensuring that the social status of jurors and hence the correctness of their verdicts were preserved and safeguarded. In this regard a series of property qualifications for jury service were introduced.⁵² This period also saw an increased reliance by the Crown on justices of the peace who were progressively empowered to investigate accusations and to hear and determine offences.⁵³ This development was instituted largely as a pragmatic crime control reaction to the apparent increase in criminal activity that followed the social and economic dislocation brought on by plague, war,

⁴⁸ *Ibid.* See also Plucknett, 1956, p.126.

⁴⁹ Groot, 1888, pp.10-15, 20; Green, 1988, p.326.

⁵⁰ Green, 1988, pp.387-90; 1985, pp.70-6, 102; Hay, 1975, pp.38-63.

⁵¹ Green, 1985, pp.69-70; McLain, 1988, pp.36-40.

⁵² Green, 1988, pp.378, 384; 1985, p.114. See also Hay, 1975, pp.17-63; Beattie, 1986, pp.378-89; and Cockburn (1985, pp.57-61) who suggests that the property qualifications governing eligibility for jury service were founded on the assumption that wealth and social status were synonymous with intelligence and good judgment.

⁵³ Putnam, 1924, pp.1-5, and see Chapter 3, above.

famine, the rise in the number of dispossessed and their combined effect upon the social structure.⁵⁴

As a result of these factors the jury - which in its earliest forms presumed a stationary population - during the later Middle Ages, ceased to be a largely self-informing institution. It could no longer be presumed to know of the events surrounding the cases it presented and tried.⁵⁵ As a corollary of this development royal officials increasingly acquired responsibility not only for the management of criminal trials but also for the initiation and prosecution of criminal cases. The principal effect of the process was to shift the burden of persuading juries of the guilt of the accused almost entirely on to the Crown. Investigatory and prosecutorial officials were authorised, therefore, to produce evidence which would favour the Crown and inculcate the accused.

In the progressively bureaucratised adversarial criminal justice process confessions of guilt elicited from suspected or accused persons became crucial to the efficient management of the criminal process. Confessions so conspicuously served to aid the discharge of the evidential burden incumbent on criminal prosecutions sponsored by the Crown that trial juries, which might be "handpicked" to favour the Crown,⁵⁶ were virtually certain to convict.

Although the verdict of the trial jury, when unfavourable to the accused, served the purpose of legitimating the imposition of penal sanctions, condemnation by the body selected to represent the community was not an invariable prerequisite since uncontested extra-judicial confessions and confessions made in open court in the form of guilty pleas were considered to be equivalent to conviction by jury. From the due process perspective, the acceptance of such avowals of guilt prevented the exposure of possible errors or abuses that may have occurred prior to trial. In legal theory defendants were entitled to have any charges made against them tested in the manner prescribed by law irrespective of whether they had furnished the Crown with an apparently free and reliable confession.⁵⁷ However, from a crime control perspective "[i]t is in the interest of all - the prosecutor, judge, and the defendant - to terminate without trial every case in which there is no genuine doubt as to the guilt of the defendant."⁵⁸ Should judicial inquiries be

⁵⁴ See Chapter 3, above.

⁵⁵ *Ibid.*

⁵⁶ See Bellamy, 1984, p.128; Green, 1985, p.131.

⁵⁷ See Packer, 1964, pp.13-23, 49-51.

⁵⁸ *Ibid.*, p.47.

mounted into all cases in which persons accused of crime profess their guilt this would impair the efficiency of the criminal justice process and undermine its primary purpose, the repression of criminal activity.

It is clear that with the evolution of the jury mode of trial the tension between these two perspectives has generally been resolved in favour of the values of crime control. Furthermore, the practice that operated, and continues to operate, to permit the state to rely on uncorroborated confessions, whether made extra-judicially or in open court, as sufficient proof of guilt suggests that historically the ideology of the adversarial trial has never been fully realised in practice. This point is further substantiated by the considerable body of historical evidence indicating that soon after the appearance of the petit jury the authorities began to experiment with forms of "plea bargaining", offering more lenient sentences to defendants by adjusting the charge or charges in return for guilty pleas.⁵⁹

The prevalence of these experiments exposes the fundamental and structural dependence of the criminal process on the guilty plea. The advantage of this practice to both the accused and the crime control interests of the Crown lay in the minimisation of the uncertainties of jury trial. For the Crown, the obviation of jury trial also facilitated the efficient disposition of criminal cases in accordance with its bureaucratic objectives. The practice of inducing pleas of guilt, whether by negotiation or by coercion, therefore, suggests that the rhetoric of the adversarial trial, which posits an open-court confrontation between the state and the accused, cannot claim a long-distant common law heritage for itself. Indeed, on the basis of the historical evidence, it may be argued that to the extent that the trial process may be described as adversarial, that quality has historically been a conditional, a contingent and a relatively recent feature of the administration of criminal justice.

Accepting that in the context of admissions of guilt the interests of crime control have historically worked to qualify the adversarial nature of criminal trials, it now falls to attempt a brief discussion of the competing values comprehended by the interests of crime control and due process as they evolved and operated in respect of the methods employed to secure confessions.

Again the historical evidence indicates that the interests of crime control have generally predominated over those of due process. This is most clearly demonstrated in the administration of the criminal process under the Tudor and Stuart governments.

⁵⁹ Baker, 1977, p.35; Cockburn, 1978, p.73; Green, 1985, pp.131-2, 148, 151-2 n.179; Cockburn (1985, pp.65-70, 105) who argues that prosecution authorities engaged in "plea bargaining" to speed up trial procedures and to militate against time-consuming jury trials; Lawson, 1988, p.117; Roberts, 1988, pp.191-2.

At trial under common law, partisan judges actively engaged in the questioning of unrepresented defendants. Although jurors were usually present to assess the bearing of the accused under examination, the primary purpose of judicial interrogatories was to secure confessions which would circumvent the verdict of the trial jury or, to obtain enough damaging material to leave the jury in no doubt as to the guilt of the defendant.⁶⁰

Increasingly, after the collapse of the self-informing jury, the evidence upon which judges based their interrogatories and jurors were to deliver a verdict resulted from the pre-trial activities of justices of the peace which had been regularised by the Marian bail and committal statutes.⁶¹ By these statutes justices were mandated to conduct pre-trial investigations of offences by the compulsory examination of suspects in order to generate evidence against the accused upon which a jury would convict.⁶² The statutes also ensured that any available private prosecutors appeared to give evidence against the accused. Should no private person be available for compulsory prosecution service the role would fall to the justices who had a general duty to coordinate and support the case for the Crown.⁶³ Finally, these measures enabled the Crown to ensnare persons accused of crime in procedures designed to secure guilty pleas and therefore their condemnation with greater efficiency and with greater certainty that convictions would be sustained and legitimised.⁶⁴

In sum, in the period comprising roughly five centuries the administration of English criminal procedures at common law was such that the jury of presentment lost its character as active presenter to become passive indictor. Meanwhile, justices had become investigators and sometime prosecutors controlling the flow of evidence to the courts, contributing to rendering the petit jury almost entirely reliant upon the information the justices could generate or, indeed, coerce from those suspected or accused.⁶⁵

These developments may be ascribed in large part to the social and crime control priorities of the ruling authorities which were brought into prominence by, and derived their justification from, the social and economic exigencies of the late Middle Ages.⁶⁶

⁶⁰ Green 1985, p.369.

⁶¹ See Langbein, 1973, pp.315-24; 1974, pp.79-93.

⁶² *Ibid.*, 1973, p.321.

⁶³ *Ibid.*, pp.317-18; Green, 1985, p.110.

⁶⁴ See 4 Holdsworth, 1945, pp.528-9.

⁶⁵ Green, 1985, p.112. And see Chapter 3, above.

⁶⁶ See above, Chapter 3.

Indeed, it was these same social and economic priorities that worked to legitimate the infliction of torture to obtain confessions.

Concurrent with the appearance of the jury mode of trial judicial torture emerged as an alternative method of securing what was considered to be reliable and incontrovertible evidence of guilt.⁶⁷ This form of coercion, however, functioned as a concomitant of the high standards of proof required by the inquisitorial procedures sanctioned by the ecclesiastical, conciliar and common law courts. Although it was to the advantage of the interests of crime control that the inquisitorial process could be initiated in the absence of an identifiable or liable accuser, the due process element lay in the requirement that proof of guilt be clear and manifest. Nonetheless, where no more than one eye-witness to a crime could be produced this "due process" requirement could be satisfied by a full confession made by the accused to the court. It was chiefly for this reason, most especially after the demise of the self-informing jury, that enormous emphasis was placed on extracting confessions by means of torture, which was generally restricted to the more intractable cases, or, in less difficult cases, by means of *ex officio* oath interrogatories.⁶⁸

Torture, therefore, may be seen as an egregious manifestation of social and crime control policies. As such, it constitutes the physical application of policies which, together with the statutory endorsement of the evidence gathering duties of justices and the *ex officio* oath process, were designed to compel suspected or accused persons to incriminate themselves and to bolster the authority of the state.

Behind the common law opposition to the jurisdictional encroachments of the High Commission and Star Chamber Courts and to the royal prerogative that legitimated their procedures, a due process reaction to these instruments of social and crime control may be detected. It tended to take the form of legalistic objections to the absence of formal presentment and charge mechanisms which might justify subjecting individuals to the inquisitorial process.⁶⁹ As the victims of the inquisitorial process often included members of the ruling elite, their representatives in Parliament joined the common lawyers and religious dissenters in opposition to government under the Crown and its oppressive institutions. By the middle of the seventeenth century this resistance had contributed to the acceptance of the Latin maxim, *nemo tenetur seipsum prodere*, that no person should be obliged to accuse themselves.

⁶⁷ See Langbein, 1977, p.75; Bartlett, 1988, pp.135, 139-46.

⁶⁸ See Bartlett, 1988, pp.140-1, 158-9.

⁶⁹ See Chapter 2, above.

The seventeenth century judicial endorsement of the principle that persons accused of crime should be protected against compulsory self-incrimination and that, accordingly, they should not be asked questions fashioned to induce incriminatory replies, may be regarded as marking the legal crystallisation of one of the foundational sources of modern due process values.⁷⁰ Indeed, within the modern discourse of criminal justice the privilege has proved to be the central nucleus around which due process and crime control considerations turn.

It was as a direct consequence of the recognition of the privilege that the Anglo-American criminal justice process took on and infixed its adversarial attributes,⁷¹ at least in respect of its public exhibitions of the formal adjudicative process. It promoted the development of the rules of evidence pertaining to the burden of proof and the presumption of innocence. Essentially, as a defendant could not, in the formal setting of the court, be questioned in the inquisitorial manner, the trial process placed upon the prosecution the burden of proving guilt on the basis of the evidence it adduced, unassisted by the accused. The defendant, who was entitled to remain silent and indeed was prevented from giving evidence on oath,⁷² was to be presumed innocent until such time as he was shown, to the satisfaction of the jury and on the basis of admissible evidence, to be "beyond reasonable doubt" guilty.⁷³

The symbolic significance of the prosecutorial burden and the attendant presumption of innocence as essentially due process obstacles against bare crime control imperatives and as delineating the relationship between the defendant and his adversary, the state, was captured by Stephen when he observed that the privilege:

contributes greatly to the dignity and apparent humanity of the criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of

⁷⁰ The Magna Charta, 1215 (particularly Articles XXXI and LII) has been seen as the earliest "due process legislation" and has been looked to as a fundamental source of modern due process values. See Moreland, 1956, p.271; Harding, 1966, pp.55-6; Blumberg, 1974, p.77; Cohen, 1977, pp.8-9; Ratushny, 1979, pp.12, 178; Mummery, 1981, pp.290-209, 314-18; Deosaran, 1985, p.11.

⁷¹ Schaefer, 1966, p.507.

⁷² See Chapters 3 and 4, above.

⁷³ That, under the common law, "the prosecution must prove the guilt of the prisoner" and that the presumption of innocence existed as a "golden thread" through the fabric of the criminal law was affirmed in the leading House of Lords case of *Woolmington v. DPP* [1935] A.C. 462, see pp.481-2, *per* Viscount Shankey, LC.

justice ... and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence.⁷⁴

The pre-trial committal process, however, was not to formally cast off its coercive inquisitorial practices until 1848 when the "right to silence" was statutorily recognised.⁷⁵ By this time the "new" police had assimilated the investigatory and prosecutorial duties that had previously been within the province of the magistracy.

In the context of the generally non-public and informal pre-trial phases of the criminal process the due process freedom from self-incrimination (the so called "right to silence") has been in acute conflict with the interests of crime control. A general view of this conflict suggests that to date the interests of crime control have largely prevailed over those of due process.⁷⁶ The predominating values of crime control have been instrumental in limiting the scope of the privilege in the extra-judicial context where it has not been implemented with as equal rigour as a due process check upon improper police questioning as it has as a protection for defendants in open court.⁷⁷

However, police practice was not entirely immune from the judicial recognition of the privilege since it was to percolate through to police duties by virtue of the evidential requirement that all confessions be voluntary in the limited sense of being free from threats or promises.⁷⁸ The privilege was also to be articulated in the caution which the police were enjoined to administer to suspects.⁷⁹ Both the requirement that such a caution be issued and the evidential requirement relating to the voluntariness of confessions were incorporated in the various Judges' Rules dating from 1912 drawn up by the authorities to regulate the procurement of incriminating statements from suspects.⁸⁰

Leaving the "gatehouses" of the criminal process to return to its "mansions",⁸¹ the privilege against compulsory self-incrimination not only contributed to the repudiation of

⁷⁴ 1 Stephen, 1883, p.442.

⁷⁵ 11 & 12 Vict., c.42, s.18 (1848). See Chapter 5, above.

⁷⁶ See Packer, 1964, pp.23, 51.

⁷⁷ See O'Connor and Cooney, 1980, pp.219, 227-236.

⁷⁸ See Chapters 5 and 6, above.

⁷⁹ *Ibid.*

⁸⁰ See Chapter 8.

⁸¹ Kamisar, 1980, pp.27-40.

official torture - leaving the tortures of *piene forte et dure* within the coercive armoury of the state until it was finally abolished in 1772⁸² - it also contributed to the extension of the availability of legal advice to persons on trial for felony who were also rendered non-compellable and incompetent to give testimony on oath. Such persons were initially conceded counsel only at the discretion of the trial judge to argue points of law. By the latter eighteenth century counsel was permitted to cross-examine prosecution witnesses. However, it was not until 1836⁸³ - despite considerable judicial opposition⁸⁴ - that persons accused of felony became entitled to have counsel address the jury on their behalf. Nevertheless, this due process right became economically practicable for the vast majority of defendants only with the establishment and expansion of the legal aid scheme in the present century.⁸⁵

That the judicial acceptance of due process antipathies to practices that compelled defendants to disclose their supposed offences manifested itself in the form of rendering the accused non-compellable and incompetent to give evidence as a witness in his own cause⁸⁶ gave a new complexion to the recurrent crime control, due process debate. By the beginning of the nineteenth century crime control objections to this concession won by the interests of due process were most notably championed in the work of the eminent jurist and philosopher, Jeremy Bentham.⁸⁷

Bentham and the Privilege Against Self-Incrimination

Bentham attacked what he considered to be "pretences"⁸⁸ supporting the retention of the privilege from an essentially utilitarian⁸⁹ and crime control⁹⁰ perspective.⁹¹ He contended

⁸² See Cornish, 1968, p.68.

⁸³ 6 & 7 Will.4, c. 114 (1836).

⁸⁴ Williams, G., 1963, p.8; Noble, 1970, p.253; Manchester, 1980, p.169.

⁸⁵ Beaney, 1955, pp.8-14; Anon., 1964, pp.1018-30; Cornish, 1968, pp.72-3; Post, 1985, pp.23-32.

⁸⁶ The accused was permitted to make an unsworn statement. This, however, was of limited probative value and was not subject to cross-examination. See *Dyer* (1844) 1 Cox C.C. 133, *per* Alderson, B; 1 Stephen, 1883, p.441; Nobel, 1970, pp.252-3; Heydon, 1976, p.376.

⁸⁷ Ratushny (1979, p.4.) argues that by this time Bentham had "established himself as the most outstanding and trenchant critic of the privilege."

⁸⁸ 7 Bentham, 1827, p.451.

⁸⁹ Postema, 1977, pp.1395-7.

that if the criminal process was to function efficiently, all the available evidence should be heard⁹² except when, in individual cases, this was inconsistent with the Principle of Utility.⁹³ His criticism of the privilege, which he felt was an "indulgence" working as an "encouragement to crime",⁹⁴ was, therefore, directed to its operation as an exclusionary rule which denied the court of "the most completely satisfactory" and "the very best sort of evidence" that could be had: the testimony of the accused.⁹⁵ When deprived by the privilege of the best evidence, courts are forced to rely on "bad evidence of various descriptions." They are as a consequence "regularly inundated by the foulest and most polluted" evidence obtained from secondary sources under the unnecessary pressures of time and expense.⁹⁶

He argued that in the public setting of the court-room under prudent judicial supervision, defendants should not be prevented from answering potentially incriminatory questions⁹⁷

⁹⁰ Menlowe, 1988, p.289.

⁹¹ Briefly stated, the five "pretences" Bentham assailed are as follows: 1. (7 Bentham, 1827, p.451) *The assumption of the propriety of the rule*. Here Bentham presents his criticisms of the "old sophism" that the rationale for the privilege is too self-evident to admit of dispute; 2. (*Ibid.*, pp.452.) In *The old woman's reason*, he opposes the proposition that to oblige the accused to incriminate himself imposes too great a hardship upon him by arguing that "[w]hatever hardship there is in a man's being punished, that and no more, is there in his thus being made to criminate himself...." Bentham, here, appears to put the cart somewhat before the horse; 3. (*Ibid.*, p.454.) He advances *The fox-hunter's reason* to disparage the idea that "fairness" - in the sense that the accused, like a fox, should be given a sporting chance - has a place in efficient criminal procedures. He concludes that "the use of a fox is to be hunted; the use of the criminal is to be tried."; 4. (*Ibid.*, pp.444-5.) Under *Confounding interrogation with torture* he asserts that "the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness." He clearly indicates, however, that such questions should only be put by a person whose station is that of a judge. See also 1 Bentham, 1825, p.102; 2 Bentham, 1825, pp.235, 244, 341-4; 5. (*Ibid.*, pp.445-6.) In his *Reference to unpopular institutions* Bentham suggests that the "abominal" inquisitorial practices of the Star Chamber and High Commission Courts, though "held in such just abhorrence by all true Englishmen" cannot, by association alone, dignify the privilege in the modern common law context. In his view, the procedural prerequisites for public trial under the common law constituted sufficient security against the re-emergence of tyrannical institutions charged to enforce pernicious penal laws. See 2 Bentham, 1825, pp.243-4.

⁹² Clearly, this view accords with the Crime Control Model proposed by Packer (1968, pp.9-13).

⁹³ 7 Bentham, 1827, pp.203-4; 304-5. See also Clapp, 1956, p.562; Menlowe, 1988, pp.292-3.

⁹⁴ 2 Bentham, 1825, p.240.

⁹⁵ 7 Bentham, 1827, p.446.

⁹⁶ 7 Bentham, 1827, pp.446-50. And see 2 Bentham, 1825, pp.241-2; 257.

⁹⁷ 7 Bentham, 1827, p.457. See also 1 Bentham, 1827, pp.101-2; 2 Bentham, 1825, pp.235, 344-6.

when they were "necessary to enlighten justice and lead her to a proper decision".⁹⁸ Defendants shown to have lied under judicial examination, he maintained, should be made liable to punishment for perjury.⁹⁹ In respect of those who obstinately remained silent, natural and legitimate inferences of guilt should be drawn.¹⁰⁰ For if they are innocent it is "morally impossible" for them to refuse to speak.¹⁰¹ The "most ardent wish" of a person who is innocent and of accused of crime is to:

dissipate the cloud which surrounds his conduct, and give every explanation which may set it in its true light; to provoke questions, to answer them, and to defy his accusers. This is his object; this is the desire which animates him. Every detail in the examination is a link in the chain of evidence which establishes his innocence.¹⁰²

The utilitarian and essentially crime control arguments advanced in the early part of the nineteenth century by Bentham in opposition to the enforced silence of the accused at trial¹⁰³ lent support to the movement that lobbied for the extirpation of the common law proscription against defendants entering the witness-box. Perhaps the most frequently repeated extract from the influential condemnation of the privilege mounted by Bentham asserts that:

If all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first they would have established for their own security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence.¹⁰⁴

⁹⁸ 2 Bentham, 1825, p.234.

⁹⁹ 7 Bentham, 1827, p.445.

¹⁰⁰ 7 Bentham, 1827, pp.424-5; 2 Bentham, 1825, p.342.

¹⁰¹ 2 Bentham, 1825, p.342.

¹⁰² 2 Bentham, 1825, p.241.

¹⁰³ Bentham specifically criticised the common law proscription against *judicially asked questions*. (2 Bentham, 1825, p.240.) This, he argued, was "in direct opposition with the only true law" namely, the sixteenth century Marian statutes which empowered magistrates to conduct examinations of person accused of felony. (*Ibid.*, at p.242.)

It should be stressed that the Marian statutes were superseded sixteen years after Bentham's death, in 1832, by Jervis' Acts 1848-9 (see Chapter 5, above). Only then was the privilege given statutory force in the pre-trial context as the, so called, "right to silence". However, the legislative endorsement of the right to silence was limited to proceedings before magistrates and was only indirectly applicable to the investigatory duties of the "new" professional police forces.

¹⁰⁴ 2 Bentham, 1825, p.241.

During the nineteenth century such protestations were employed to assail the operation of the privilege at trial. Later, with particular reference to pre-trial interrogations of suspects by the police under the Judges' Rules initially drawn up in 1912,¹⁰⁵ Bentham would be "incorrectly cited"¹⁰⁶ by crime control critics of the pre-trial expression of the privilege who argued that if all suspects freely exercised their right to remain silent valuable information would be lost to the detriment of the fight against crime.¹⁰⁷

However, nineteenth century hostility to the privilege was directed primarily to its trial or judicial expression and, after 1836, was generally couched in terms of an altruistic concern to secure for the accused the right of giving his own testimony under oath. Thus articulated, the essentially crime control opposition to the privilege could be presented as a benevolent attempt to equalize the position of the defendant with that of the prosecution.¹⁰⁸ The Act of 1836 allowing prisoners accused of felony to make their defence by counsel, therefore, was used by critics of the testamentary incompetence of defendants to argue that the interests of justice were undermined when counsel for defendants argued that if their clients were not prevented from entering the witness-box they could easily establish their innocence.¹⁰⁹

Competency Secured

Legislative cognisance of the movement which sought to render the accused "oath-worthy" at his trial began in 1843¹¹⁰ and culminated in 1898 with the Criminal Evidence

¹⁰⁵ See Chapter 8.

¹⁰⁶ Easton (1991, pp.ix, 30.) implies that the error lies in the somewhat tenuous assumption that as Bentham was hostile to the right to silence at trial, he would naturally oppose the pre-trial right to silence. See *supra.*, n.103.

¹⁰⁷ See, for example, Cross, 1970, pp.66-75. See also the Criminal Law Revision Committee, Eleventh Report, *Evidence (General)* Cmnd. 4991., 1972, (CLRC., 11th Rep., 1972) whose controversial proposal to restrict the right of the accused to remain silent became the subject of heated debate. In this respect see MacKenna, 1972, pp.605-21; Zuckerman, 1973, pp.509-18; Zander, 1974, pp.954-5; Greenwalt, 1974, pp.235-68; Heydon, 1976, pp.375-93.

¹⁰⁸ See Noble, 1970, p.259.

¹⁰⁹ *Ibid.*, p.253. And see Williams, G., 1963, pp.45-7.

¹¹⁰ The enactments in question comprise the, Evidence Act, 6 & 7 Vict., c.85 (1843); County Court Act, 9 & 10 Vict., c.95 (1846); Evidence Act, 14 & 15 Vict., c.99 (1851); Evidence Amendment Act, 16 & 17 Vict., c.83 (1853); and the Criminal Law Amendment Act, 48 & 49 Vict., c.69 (1885). For a discussion of the Acts, see Noble, 1970, pp.254-6.

Act¹¹¹ which formally made the defendant a competent, though not compellable, witness in his own defence. The principal justification offered by the proponents of this measure was that affording the wrongly accused an opportunity to give their own evidence on oath (for which an unsworn statement was no substitute) would enable them to escape unjust convictions. It followed, therefore, that it would also better facilitate the reliable conviction of the guilty and prevent unjust acquittals.¹¹² This reasoning prevailed over the various arguments raised by the opponents of the proposed reform.

The opponents contended that innocent persons, who are for the most part "ignorant, unintelligent [and] cowed by the misery and danger of their position", would be prone, under cross-examination, to give a false account of themselves and thereby greatly increase their liability to conviction.¹¹³ Furthermore, it would virtually destroy the presumption of innocence. The enforced silence of the accused required the prosecution to prove its case beyond all reasonable doubt. Were prisoners competent witnesses the standard of proof would be such that juries would merely strike a balance of probabilities between the truth of assertions of innocence and the inference of guilt raised by the evidence for the Crown.¹¹⁴ Therefore, it was argued, the prosecution would, in effect, carry a lighter burden of proof; it would need only to present a case that appeared to the jury to be stronger than that of the accused.¹¹⁵ The defendant would be "practically bound to give evidence".¹¹⁶ Juries would "draw every conceivable inference to his disadvantage if he [did] not."¹¹⁷ His failure to testify, therefore, "will, and inevitably must, create a presumption against his innocence".¹¹⁸ This would place the prosecution under "a strong

¹¹¹ 61 & 62 Vict., c.36 (1898). Jurisdictions within the United States and many of the British colonies preceded England in making the accused oath-worthy. See Williams, G., 1963, p.48; Parker, 1984, pp.161-2.

¹¹² See Stephen, J.F., 1877, pp.752-57; 1886, pp.454-72; 1 Stephen, 1883, p.442; Pitt-Lewis, 1896, pp.812-25; Parliamentary Debates, (Lords) 1898, Evidence in Criminal Cases Bill, pp.1170-84; (Commons) Criminal Evidence Bill, speech of the Attorney-General, Sir Richard Webster, pp.977-85. See also 2 Wigmore, 1940, pp.704-6; Noble, 1970, pp.259-61; Parker, 1984, pp.162-4, 168-72.

¹¹³ Wills, 1878, pp.170-1. See also Stephen, H., 1898, pp.8, 13-15, 18-19; 2 Wigmore, 1940, p.703.

¹¹⁴ Stephen, H., 1898, pp.16-18.

¹¹⁵ *Ibid.*, p.20.

¹¹⁶ *Ibid.*

¹¹⁷ (1867) *American L.R.* 443, p.445.

¹¹⁸ *Ibid.*

temptation ... to get up the case in a far less thorough ... manner than they otherwise would."¹¹⁹

The wealthy, it was argued, would be "carefully advised" and afforded "every chance of escape ... that premeditation and skill could secure."¹²⁰ The unrepresented defendant would be particularly vulnerable, especially when juries habitually received the evidence of police officers with "unhesitating credence".¹²¹ Any motivation for the guilty to lie would not be influenced by making accused persons oath-worthy for the risk of prosecution for perjury would be preferable to being convicted out of their own mouths.¹²² It was also contended that to render the accused competent as a witness was unnecessary as a means of ensuring the guilty were convicted since the relevant criminal statistics showed that eighty-two per cent of persons tried for indictable offences were convicted.¹²³

Finally, concern was also expressed in regard to proceedings before magistrates. It was argued that while the magistracy were the recipients of only limited legal training they were nonetheless required to act judicially in matters that affected their class interests and did so at sites "much removed from the fierce glare of publicity."¹²⁴

Such arguments notwithstanding, throughout the prolonged Parliamentary and extra-Parliamentary debate,¹²⁵ there appears to have been little discussion directly upon how far the proposed Act would affect the privilege against self-incrimination.¹²⁶ Nevertheless, the provisions of the 1898 Act represents a compromise between the opposing views.¹²⁷ For instance, while section 1(f), when read with sections 1, 1(a) and 1(b), appears to incorporate the *nemo tenetur seipsum prodere* principle, that section also includes three important qualifications. Section 1 (f) reads as follows:

¹¹⁹ Stephen, H., 1898, p.20.

¹²⁰ Wills, 1878, p.173.

¹²¹ *Ibid.*, pp.174-5.

¹²² Stephen, H., 1898, pp.21-3.

¹²³ *Ibid.*, pp.13-4.

¹²⁴ Wills, 1878, pp.176-8.

¹²⁵ For a discussion of the debate that preceded the 1898 Act, see Noble, 1970, pp.249-66; Parker, 1984, pp.156-75.

¹²⁶ Parker, 1984, p.172.

¹²⁷ See *Maxwell v. DPP* [1935] AC 309, *per* Lord Shankey, p.317. See also Williams, G., 1963, p.58.

A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is charged, or is of bad character, unless-

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

The Practical Effects of the 1898 Act

In regard to confessions alleged by the prosecution to have been made extra-judicially, section 1 (f) (ii) has been productive of most difficulties particularly where the defendant challenges the incriminatory statements attributed to him.¹²⁸

Although a number of equivocal and irreconcilable judicial authorities have been generated under the Act,¹²⁹ it is clear that a defendant *qua* witness with previous convictions runs the risk, subject to the discretion of the trial judge,¹³⁰ of having not only his past convictions but also his "bad character"¹³¹ revealed to the jury if he or his counsel in the course of developing a defence puts his own good character in issue or casts imputations against the character of persons on whom the Crown is relying. As Channel, J, in the Court of Appeal, in 1909 put it:

If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of his witnesses ... upon the ground that his conduct ... makes him an unreliable witness, then the jury ought also to know the character of the prisoner who

¹²⁸ See Stone, 1942, p.347; Smith, 1964, p.444; Wolchover, 1981, p.312; Cohen, 1981, pp.528-9; Pattenden, 1982, pp.713-4.

¹²⁹ See Griew, 1961, p.146; Williams, G., 1963, p.233; Smith, 1964, p.444; O'Donoghue, 1966, p.492; Pattenden, 1981, p.710.

¹³⁰ *Jenkins* (1945) 31 Cr.App.R. 1, p.15; *Selvey v. DPP* [1970] AC 304.

¹³¹ Including any "bad acts, offences and charges" irrespective of whether they resulted in convictions, provided they are relevant to the offence or offences under trial. (Stone, 1935, pp. 451-2, 463.) See also Williams, E., 1914, p.296; *Maxwell v. DPP* (1934) 24 Cr.App.R. 152, *per* Lord Sankey, p.171; *Jones* [1962] AC 647; Pattenden, 1982, p.709. Compare *Stirland v. DPP* (1943) 30 Cr.App.R. 40, p.51; *Cokar* [1960] 2 QB 207; Griew, 1961, p.220-1; Smith, 1964, p.444.

either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character to show that the jury ought not to rely upon his evidence.¹³²

In principle, once the accused has placed his character in issue or has attacked any witness for the Crown, the cross-examination by the prosecution may be directed to showing that he is not a creditable witness.¹³³ However, the statute does not explicitly prevent the use of cross-examination to show his "delinquent disposition" and thus the probability of his guilt.¹³⁴ In any event, it has been questioned whether the legal distinction between questions that go to credit and those that tend to guilt is appreciated either by juries or magistrates.¹³⁵

In practice, according to Wigmore, the effect of the Act is to ensure that "the accused's record of prior convictions does get before [magistrates or juries] and is considered by them as character evidence, affirmatively pointing to guilt. The statute does not say the penal record is to be considered for that purpose, but the statute makers *knew* it *would* be so considered."¹³⁶ Thus, where a defendant expressly or impliedly¹³⁷ asserts that an allegedly voluntary confession had been extorted from him, so as to raise as imputation of perjury against the police, he brings himself and his bad character, if any, within section 1 (f) (ii).¹³⁸ Plainly, the legal rhetoric which has it that it is for the prosecution to prove its

¹³² *Preston* [1909] 1 KB 568, p.575. See also *Wood* [1920] 2 KB 179, *per* Lord Reading, p.182; *Roberts* (1920) 15 Cr.App.R. 159, p.168; *Jenkins* (1945) 31 Cr.App.R. 1, p.15; *Butterwasser* [1948] 1 KB 4, p.6; *Cook* [1959] 2 QB 340, p.348; *Richardson* (1968) 52 Cr.App.R. 317, p.331; *Selvey v. DPP* [1970] AC 504; *Stubbs* [1982] 1 All ER 424.

¹³³ See *Stirland v. DPP* (1943) 30 Cr.App.R. 40; *Bathurst* [1968] 2 QB 19, *per* Parker LCJ, p.108. See also Stone, 1935, p.455; Pattenden, 1982, p.709.

¹³⁴ See Stone, 1935, pp.445-67; Wolchover, 1981, p.320; Pattenden, 1982, p.709.

¹³⁵ See Stone, 1935, pp.456-7; Wolchover, 1981, pp.320-1. See also CLRC, 11th Rep., 1972, para.120.

¹³⁶ 1 Wigmore, 1940, pp.652-3 (emphasis supplied). See also Stone, 1935, p.456; 1942, pp.371-2. And see *Cook* [1959] 2 QB 340, pp.344-5, *per* Devlin, J: "The difficulty about [the Act's] phraseology is that unless it is given some restricted meaning, a prisoner's bad character, if he had one, would emerge almost as a matter of course."

¹³⁷ Cohen, 1981, pp.526-7.

¹³⁸ See, for example, *Preston* [1909] 2 KB 568, *per* Channel, J., p.574; *Wright* (1910) 5 Cr.App.R. 131, p.134; *Hudson* [1912] 2 KB 464, *per* Alverstone, LCJ., pp.470-1; *Jones* (1923) 17 Cr.App.R. 117, p.120; *Turner* [1944] 1 All ER 599; *Clark* [1955] 2 QB 469, *per* Lord Goddard, LCJ, p.676; *Levy* (1966) 50 Cr.App.R. 288; *Tanner* (1978) 66 Cr.App.R. 56, *per* Browne, LJ., p.64; *Nelson* (1979) 68 Cr.App.R. 12; *Duncalf* (1979) 69 Cr.App.R. 206. Compare *Bridgewater* [1905] 1 KB 131; *Parker* (1924) 18 Cr.App.R. 14; *Stirland v DPP* [1943] AC 315, *per* Viscount Simon LC, p.327.

case unassisted by the accused is in reality made conditional in respect of those defendants with previous convictions who presume to contest the testimony of police witnesses.

Adverse Inferences

The 1898 Act also stipulates that the accused "shall not be called as a witness ... except upon his own application",¹³⁹ and that "the failure of any person charged with an offence ... to give evidence shall not be made the subject of any comment by the prosecution".¹⁴⁰ Yet despite the clear implication that the accused is to be given a free choice in the matter,¹⁴¹ in practice he is liable to have adverse inferences drawn by the jury if he fails to testify.¹⁴² Indeed, the trial judge is entitled to invite the jury to do so.¹⁴³

The Act, therefore, presents the defendant with the "choice" of either electing not to give evidence on oath,¹⁴⁴ with the consequential risk that inferences adverse to his innocence will be drawn, or of opting to testify with the risk that he will be entrapped into incriminating himself under cross-examination. In short, irrespective of whether the fact-finder will inevitably draw unfavourable inferences from his silence¹⁴⁵ - and if so it might be questioned whether it is necessary to permit judges to make unfavourable comments - the defendant who wishes to contest the case against him, in order to prevent adverse

¹³⁹ s.1 (a).

¹⁴⁰ s.1 (b).

¹⁴¹ O'Regan, 1965, pp.711-12. And see *Much* [1973] 1 All ER 178.

¹⁴² See Williams, G., 1963, pp.48-63; O'Regan, 1965, pp.711-17; Miller, 1973, pp.351-3.

¹⁴³ See *Rhodes* [1899] 1 QB 77, *per* Russell, LCJ, p.83; *Bernard* (1908) 1 Cr.App.R. 218, *per* Darling, J, p.219: "It is right that juries should know, and, if necessary be told, to draw their own conclusions from the absence of explanations by the prisoner." See also the case of *Nodder* (cited in Williams, G., 1963 pp.59-60) where Swift, J remarked to the jury: "There is one man in the world who knows the whole story, and when you are trying to elicit that which is true he sits there and never tells you a word." And see *Sparrow* [1973] 1 WLR 488, *per* Lawton, LC, pp.493-7; *Much* [1973] 1 All ER 178.

¹⁴⁴ The option of giving an unsworn statement which was not subject to cross-examination was abolished by s.72 (1) of the 1982 Criminal Justice Act in accordance with the recommendations of the CLRC, 11th Rep., 1972, paras.102-6.

¹⁴⁵ See *Whitehead* [1929] 1 KB 99; *Jackson* [1953] 1 WLR 591, *per* Goddard, LCJ, p.595: "...everybody knows that absence from the witness box requires a very great deal of explanation...."; *Sparrow* [1973] 1 WLR 488, *per* Lawton, LJ, p.493: "...juries seldom acquit persons who do not give evidence where there is a clear case to answer and they do not answer it...." See also Zander, 1977, p.355.

inferences or comments, is in effect obliged to give evidence and to attempt to satisfy the jury of his innocence.¹⁴⁶

Moreover, the effective subversion of the rhetoric of the adversarial process, of presumed innocence, of the right to silence and of the prosecutorial burden of proof at the trial stage also has a direct impact upon the pre-trial incidence of these features associated with due process. As such, the reality of criminal justice is such that just as the jury may inevitably, or by judicial invitation, regard the absence of the accused from the witness-box as strengthening the case for the Crown, so a similar rationale operates in respect of the accused to account for himself under police questioning.

Thus, while the rhetoric of the law accords the citizen an absolute right to refuse to answer extra-judicial questions put to him by persons in authority¹⁴⁷ - indeed he is to be cautioned that he need not answer such questions and informed that should he answer his statements may be used in evidence against him¹⁴⁸ - the reality of the law permits the inference that by not mentioning his story to the police, thereby denying them the opportunity of investigating its veracity,¹⁴⁹ any explanation subsequently given at trial, should one prove forthcoming, is not credit-worthy. And while the rhetoric of the law suggests that the fact-finder is not entitled to infer guilt from his failure to advance an explanation before trial,¹⁵⁰ the practice of the law indicates that magistrate, judge and jury may nevertheless infer guilt from any exercise of the right to silence.¹⁵¹

In practical terms, therefore, the right to silence is of marginal significance.¹⁵² Any suspect or defendant who avails themselves of it is liable to be presumed to be guilty. This would suggest that the rhetoric of the adversarial process serves to obscure what is in reality a criminal justice process that is pervaded by inquisitorial features.

¹⁴⁶ Williams, G., 1963, p.59.

¹⁴⁷ *Rice v. Connolly* [1966] 2 QB 414.

¹⁴⁸ *Naylor* [1933] 1 KB 685, *per* Hewart, LCJ.

¹⁴⁹ See *Littleboy* [1934] 2 KB 408, *per* Hewart, LCJ, pp.411-14; *Leckey* [1944] KB 80, *per* Viscount Caldecote, CJ, p.86.

¹⁵⁰ *Ryan* [1966] 50 Cr.App.R. 144, *per* Stevenson, J, p.148.

¹⁵¹ *McBarnet*, 1981b, pp.57-9.

¹⁵² Zander, 1977, p.356; Roberts, 1978, p.153.

Conclusion

Having discussed the place confessions have historically occupied as a structural feature in the criminal justice process that has evolved from the thirteenth century through to the end of the nineteenth century, consideration must now be given to twentieth century developments. In the chapters that follow the discussion will pay attention to the regulatory framework which has worked to legitimise the procurement of extra-judicial confessions from suspects detained in custody by the police. The practical operation of the due process protections provided for detainees against improper police activities will also be considered, as will the essentially crime control attacks upon those protections. The chapters will demonstrate that in practice the rhetoric of due process has generally been subordinated to the crime control priority of permitting the police virtually unfettered access to those detained in their custody in order to obtain incriminating evidence.

It will be shown that the rhetoric of due process has served to disguise the crime control reality of a progressively legitimised interrogative process which, despite the mechanisms that have been introduced to safeguard the interests of detainees and to attain for the products of the questioning process greater levels of reliability, remains geared to implicating the accused in his or her own conviction. The role played by the police in the legitimating project will also be assessed, as will the strategies employed by the police to preserve that role. In this regard the chapters will focus on the extent to which the success of the police, over the course of the present century, in securing unmediated access to persons held in their custody provided officers with the capacity both to resort to manipulative or coercive tactics in their interactions with detainees and to do so in a context which gave the police full control over the accounts of such interactions. The final and crucially important aspect of the legitimating project which will be addressed concerns the ability of the police through their accounts of custodial interrogations to create and control images not only of the interrogation process itself, but also of themselves, their work and, finally, the character or culpability of those interrogated by the police.

8

GENESIS OF THE JUDGES' RULES

The primary rational for the exclusion of confession evidence is said to be the principle of reliability. The courts, it has been claimed, would not admit in evidence against an accused any confession that appeared untrustworthy and a confession would be considered as such if it had been induced by the flattery of hope or by the torture of fear.¹

Traditionally the assessment of the reliability of a given confession had always been a matter for the trial judge,² though certain judges in the nineteenth century felt that it should be left to the jury.³ The tribunal of fact, Jackson suggests, was denied the task of determining the reliability and thus the admissibility of a statement because the Crown had little confidence in the ability of the jury, as opposed to its judges, to weigh the probative value of confessions against their prejudicial effects.⁴ However, the exclusionary rule and the attendant requirement of voluntariness that had evolved under the judges during the nineteenth century was in practical terms incapable of ensuring reliable confessions were received and unreliable confessions excluded.⁵

Elliott accepts that confessions, with the emergence of the exclusionary rule, were rejected when of doubtful reliability. He adds, however, that by the end of the nineteenth century "it became recognised that the real reason was to restrain the activities of the police in the questioning of suspects in custody."⁶ This observation would appear to gain support from the consideration that while the rhetoric of the exclusionary rule indicates a concern for the reliability of confessions, in practice the rule avoided a direct inquiry into the actual trustworthiness of alleged confessions.

¹ See 3 Wigmore, 1970, p.822. Early support for this view may be found in *Warickshall* (1783) Leach. 263, pp.263-4. See also *Thomas* (1836) 7 C. & P. 345, p.346; *Court* (1836) 7 C. & P. 486, p.487; *Holmes* (1843) 1 C. & K. 248; *Scott* (1856) D. & B. 47, p.48; *Gillis* (1866) 11 Cox C.C. 69, p.74; and *Baldry* (1852) 2 Den. 430, p.445, *per* Campbell, LCJ. Also see *Ibrahim* (1914) AC 599, p.610.

² See *Ibrahim* (1914) AC 599, p.611, *per* Lord Sumner.

³ See, for example, *Baldry* (1852) 2 Den. 430, *per* Park, B, p.445 and *per* Campbell, LCJ, pp.446-7.

⁴ Jackson, 1986, pp.224-5. See also *Baldry* (1852) 2 Den. 430, pp.441-2, *per* Pollock, CB.

⁵ Jackson, 1986, pp.225, 235. Ratushny (1971, at p.494) argued that the "voluntariness rule inhibits the search for truth ... for a judge must ask not whether the statement is a reliable piece of evidence but whether it has been obtained in a certain manner.... though the answer to [this] ... might well provide some assistance in determining reliability."

⁶ Elliott, 1987, p.192. See also Ratushny, 1971, pp.474-6.

Despite this the exclusionary rule, especially from the second half of the nineteenth century, afforded judges limited means to supervise the largely unregulated and unspecified powers of the progressively bureaucratised machinery of criminal investigation under the "new" professionalised police. That some judges were concerned to scrutinise the investigation and prosecution brief - traditionally left almost entirely to the initiative of private individuals or magistrates, and latterly acquired by the professional police forces who engaged in the practice of questioning suspects detained in custody⁷ - is demonstrated by a number of rulings from the period.⁸ Consequently, the attitude of the judiciary in regard to the propriety of the questioning of suspects in custody, the increasing use of police stations for interrogations,⁹ the role of the caution and the ambit of the exclusionary rule,¹⁰ lacked uniformity, clarity and precision.¹¹

In 1882, however, an attempt was made to provide the police with guidance as to their investigatory powers over the citizen and the attitude the police could expect the courts to adopt in respect of confession evidence obtained in the exercise of that power. This guidance was delivered by Lord Brampton¹² in the *Preface to Vincent's Police Code*¹³ where, addressing his comments to police officers, he stated that:

... there is no objection to you making enquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such inquiries; and in the course of them you should chance to interrogate and to receive

⁷ Lidstone and Early (1982, p.501) argue that "[w]hen the new police were created they were invested with the authority of the State as well as that of the master but being poorly educated themselves and not skilled in interrogation threats or promises were commonly used to obtain confessions or admissions of guilt. It is then understandable that judges should seek to avoid the dangers of false confessions by the test of voluntariness."

⁸ See, for example, *Berriman* (1854) 6 Cox C.C. 388; *Mick* (1863) 3 F. & F. 322; *Bodkin* (1863) 17 Cox C.C. 689; *Gavin* (1885) 15 Cox C.C. 656.

⁹ Abrahams, 1964a, p.12.

¹⁰ Neasey, 1969, pp.484-5.

¹¹ *Ibrahim* (1914) AC 599, at p.614, *per* Lord Sumner: "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal cases."

¹² Lord Brampton, as Mr Justice Hawkins, sat as presiding judge in *Miller* (1895) 18 Cox CC 54 which may be contrasted with *Histed* (1898) 19 Cox CC 16 also heard before Hawkins, J.

¹³ Extracts from Lord Brampton's address to the police are reproduced in the *Report of the Royal Commission on Police Powers and Procedure* (RCPPP), 1929, (the Lee Commission) Cmd.3297, pp.147-8. See also Abrahams, 1964, pp.13-15; *Vincent's Police Code*, 7th edn., 1931, pp.vii-xiv.

answers from a man who turns out to be the criminal himself, and who inculpates himself by these answers, they are nevertheless admissible in evidence, and may be used against him.

By this part of his advice to the police Lord Brampton suggests his judicial brothers would readily receive in evidence admissions and confessions obtained by the police through their questioning of individuals not suspected or accused of crime. While this would appear to be an accurate reflection of the common law position, it fails to make clear that, also under the common law, the police could not oblige such an individual to respond to their questions or to otherwise assist them in their investigations.¹⁴ The address continues, however, by drawing a distinction between persons at liberty and those detained in police custody. It states that:

When ... a constable has a warrant to arrest, or is about to arrest a person on his own authority, or has a person in custody for a crime, it is wrong to question such person touching the crime of which he is accused. Neither judge magistrate nor juryman, can interrogate an accused person - unless he tenders himself as a witness - or require him to answer questions tending to incriminate himself. Much less, then, ought a constable to do so whose duty as regards that person is simply to arrest and detain him in safe custody.... For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong.

The guidance points out that any statement made by an accused person "in consequence of, any promise or threat", even if that statement constitutes a full confession of guilt, "cannot be used against the person making it." It then concludes:

There is, however, no objection to a constable listening to any mere voluntary statement which the prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement without first cautioning him.... Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, "keep your eyes and your ears open, and your mouth shut." ... Never act unfairly to a prisoner by coaxing him by word or conduct to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely that your evidence will be disbelieved.

¹⁴ This was not authoritatively declared to be the common law position until the case of *Rice v. Connelly* [1966] 3 WLR 17; 2 QB 414. However, see the Report of the RCPMP, 1929, para.57, pp.22-3; para.98, p.38.

Three years after its appearance in one of the leading manuals directed to the police and their duties, the approach advocated by Lord Brampton was endorsed by Smith, J in *Gavin*¹⁵ However, the decision in *Best*,¹⁶ disapproving of *Gavin*, suggests other judges felt it necessary to counter the presumption that any statement made in reply to questions put by persons in authority such as police officers should *ipso facto* be deemed involuntary and therefore inadmissible.

Judicial views, however, remained inconsistent and contradictory. Although it seems to have been accepted that the police could ask questions of a person not in custody,¹⁷ judges continued to condemn the questioning of suspects detained in custody.¹⁸ Furthermore, it was felt that the caution - originally designed to inform suspects of their legal right to remain silent - had, under the police, become a device with which "to make it easy and simple for the prosecution to discharge the burden of proving that the confession was voluntary."¹⁹

It was against this background of conflicting judicial authorities that the Chief Constable of Birmingham in 1906 wrote to the Lord Chief Justice, Lord Alverstone, requesting guidance respecting the taking of statements from individuals by the police.²⁰ Pursuant to this correspondence, and "at the request of the Home Secretary",²¹ further directions for

¹⁵ Who there declared that "[w]hen a prisoner is in custody the police have no right to ask him questions." (*Gavin* (1885) 15 Cox C.C. 656, p.657.) See also *Male and Cooper* (1893) 17 Cox C.C. 689; *Histed* (1898) 19 Cox C.C. 16; *Knight and Thayre* (1905) 20 Cox C.C. 711.

¹⁶ *Best* (1909) 1 K.B. 692. See also *Brackenbury* (1893) 17 Cox C.C. 628; *Miller* (1895) 18 Cox C.C. 54; *Hurst* (1896) 18 Cox C.C. 374; *Rogers v Hawken* (1898) 19 Cox C.C. 122; *Booth and Jones* (1910) 74 JP 375; *Lewis v Harris* (1913) LTR 109.

¹⁷ See *Lewis v. Harris* (1913) 110 LT 377; *Crowe and Myerscough* (1917) 81 JP 288; *Mathews* (1919) 14 Cr.App.R. 73.

¹⁸ See *Winkel* (1912) 76 JP 191; *Gardner and Hancox* (1915) 11 Cr.App.R. 267.

¹⁹ Devlin, 1960, p.32. See also RCPMP, *Report*, 1929, para.64, p.25.

²⁰ The Chief Constable was prompted to seek this advice because on the Birmingham Circuit one judge had censured a member of his force for having cautioned a prisoner, whilst another judge had censured a constable for omitting to do so. (See Abrahams, 1964a, p.16; Devlin, 1960, p.33.) In reply to this request, Lord Alverstone wrote: "There is, as far as I know, no difference of opinion whatever among any of the judges of the King's Bench Division upon the matter." (cited in Abrahams, 1964a, pp.16-17.) This would suggest that Lord Brampton's earlier analysis of judicial practice merely reflected the attitude of the senior judiciary and not the consensus view of the wider judiciary.

²¹ See *Voisin* (1918) 13 Cr.App.R. 89, p.96, *per* Lawrence, J who described the origin and status of the "Rules" as follows: "In 1912, the judges, at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at trial."

the guidance of the police were issued in 1912 in the form of four rules which became collectively known as the Judges' Rules.²²

The Rules were not widely disseminated and the outbreak of war in 1914 further postponed their subjection to critical evaluation.²³ In 1918, however, in two decisions heard before the then recently established Court of Criminal Appeal,²⁴ the Judges' Rules were considered judicially for the first time.²⁵ Later in the same year the four 1912 Rules were increased to nine.²⁶ In 1930, after a Royal Commission had revealed differences of opinion and practice among police officers,²⁷ an attempt was made to clarify the Rules through a Home Office circular issued with the approval of the judges.²⁸ Aside from the

²² The 1912 rules were stated in *Voisin*, *ibid.*, as follows:

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons whether suspected or not from whom he thinks that useful information can be obtained.
2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such a person before asking any questions or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement the usual caution should be administered. It is desirable that the last two words ("against you") of such caution should be omitted, and that the caution should end with the words "be given in evidence."

²³ Lee Commission, 1928-29, Minutes of Evidence, vol.2, p.6.

²⁴ The Court was created by the Criminal Appeal Act, 1907, s.1. and superseded the Court for Crown Cases Reserved.

²⁵ In *Voisin* (1918) 13 Cr.App.R. 89, p.90, Lawrence, J quoted the Rules to defence counsel, *arguendo*, and in *Cook* (1918) 34 TLR 515, p.516, Darling, J cited them in delivering the judgment of the court.

²⁶ The additional rules were stated as follows:

5. The caution to administered to a prisoner, when he is formally charged, should ... be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything but whatever you do say will be taken down in writing and may be given in evidence."

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done to invite a reply. If the persons charged desires to make a statement in reply, the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

²⁷ RCPMP, *Report*, 1929, Cmd. 3297.

²⁸ Home Office Circular No.536053/23, June 24, 1930.

appearance of another circular in 1947, directed to supplementary rules of procedure,²⁹ the Judges' Rules stood unaltered until they were revised in 1964.³⁰ In 1986 this version was superseded by the coming into force of the 1984 Police and Criminal Evidence Act (PACE).

The 1912 and 1918 Judges' Rules

For McCormick, the Judges' Rules represented a "strange extension of the judicial function."³¹ Certainly, the Rules were not the product of any *ratio decidendi* and cannot be described as *obiter dicta*.³² Further, as guidance for police officers, drawn up extra-judicially by a convocation of senior judges, with the apparently private cooperation of the executive and without the express participation of Parliament,³³ the Rules were not intended to be legislative in either form or effect, to be enforceable in court or, indeed, to have the force of law.³⁴

In terms recalling the advice written by Lord Brampton in 1882, the Rules constituted the considered view of the senior members of the judiciary respecting the overriding common law requirement that extra-judicial statements, to be received in evidence against accused persons, must be shown by the prosecution to have been made "voluntarily".³⁵

²⁹ Home Office Circular No.238/1947.

³⁰ Home office Circular No.31/1964; see Abrahams, 1964, pp.53-60; *Crim.L.R.* [1964] pp.165-173; Fellman, 1966, p.35.

³¹ McCormick, 1946, p.256. See also Neasey, 1969, p.494.

³² A Stipendiary Magistrate erroneously described them as *obiter dicta* when giving evidence to the RCPMP, Minutes of Evidence, Q.8180.

³³ An examination of the relevant departmental files, held at the Public Record Office, failed to illuminate the scope and nature of the deliberations of the judges of the Kings' Bench, the extent of the involvement of the Home Office and revealed no evidence to suggest that Parliament had been consulted prior to, or had participated in, the formulation of the 1912 or 1918 Rules.

³⁴ See *Voisin* (1918) 13 Cr.App.R. 89, p.96; *Dwyer* (1932) 23 Cr.App.R. 156; *Wattam* (1952) 36 Cr.App.R. 72; *Bass* [1953] 37 Cr.App.R. 51. See also Devlin (1960, p.39): "It must never be forgotten that the Judges' Rules were made for the guidance of the police and not for the circumspection of the judicial power." Also see Brownlie, 1960, pp.298-324; Fellman, 1966, p.36; Neasey, 1969, p.494; Gooderson, 1970, pp.270-1; Leigh, 1975, p.145. St. Johnston (1948, p.93) a Chief Constable, however, contended that the Rules had "with the passing of time come to have the force of law."

³⁵ *Thompson* (1893) 2 Q.B. 12; *Ibrahim* (1914) A.C. 599; *Voisin* (1918) 13 Cr.App.R. 89; *Cook* (1918) 34 TLR 515; RCPMP, Report, 1929, pp.65-67; Devlin, 1960, p.32; *Callis v. Gunn* [1964] 1 Q.B. 495, *per* Parker, LCJ, p.501; *Ovenell* [1969] 1 QB 17; Teh, 1972, p.491; *Greaves* (1980) 71 Cr.App.R. 232, *per*

This restrictive, and by the beginning of the twentieth century, prevailing view of the exclusionary rule held that, irrespective of the administration of a caution, whether a confession was obtained under custodial interrogation or not it could be excluded only if threats or promises were held out to induce an involuntary confession.³⁶ Although this view of the test of voluntariness conflicted with the broad view that had in the preceding century been espoused by other judges,³⁷ it nevertheless reflected the prevailing common law position respecting the conduct of police investigations and the admissibility of confessions obtained thereby.³⁸ While Lord Sumner found the common law, as it obtained at the beginning of the present century, "still unsettled",³⁹ it seems clear that the Rules were intended to reflect "the balance of decided authority"⁴⁰ which did not prohibit the police from asking questions of any person not yet charged,⁴¹ or taken into custody.⁴² However, those authorities made clear that once a person was in custody, the police had no authority to interrogate him.⁴³

In embracing the common law requirement of voluntariness, as understood by the judges of the Kings' Bench,⁴⁴ the Rules, also recognized a judicial discretion to exclude statements obtained by methods deemed "contrary to the spirit of the rules."⁴⁵ This would

Donaldson, LJ, p.236: "... it must be remembered that the whole purpose of the Judges' Rules ... is to ensure that statements are voluntary."

³⁶ *Lewis v. Harris* (1913) 30 LTR 109; *Voisin* (1918) 13 Cr.App.R. 89, *per* Lawrence, J, pp.94-5; *Cook* (1918) 34 TLR 515.

³⁷ See *Ibrahim* (1914) AC 599, p.614.

³⁸ Compare McBarnet's (1981c, p.110) suggestion that the Rules departed from a "common law approach which had drawn the line between police powers and citizens rights firmly and clearly in favour of civil liberties."

³⁹ *Ibrahim* (1914) AC 599, p.614.

⁴⁰ *Ibid.*

⁴¹ *Miller* (1895) 18 Cox C.C. 54. See also *Berriman* (1854) 6 Cox C.C. 388.

⁴² *Brackenbury* (1893) 17 Cox C.C. 628; *Booth and Jones* (1910) 5 Cr.App.R. 177.

⁴³ *Winkel* (1912) 76 JP 191; *Gardner and Hancox* (1915) 11 Cr.App.R. 267.

⁴⁴ The concept of voluntariness had acquired a specifically legal and somewhat restricted meaning under the nineteenth century case law. During the twentieth century, before the enactment of PACE, 1984, it permitted an increasingly "extensive range of variation" (RCPPP, *Report*, 1929, para.63, p.25) and was "interpreted in ways which stretch[ed] the meaning of the word to breaking point." (McBarnet, 1981c, p.110.)

⁴⁵ *Voisin* (1918) *supra*. n.34. See also *Histed* (1898) 19 Cox CC 16; *Knight and Thayre* (1905) 20 Cox CC 711, p.713.

suggest that trial judges were afforded two closely related grounds upon which to exercise a discretion to exclude. The first, derived from the late nineteenth century judicial practice of excluding confessional statements in spite of their being strictly admissible under the narrow voluntariness test. The second, stemmed from the Rules themselves which clearly implied that a failure to comply with them was of itself a legitimate ground upon which the discretion to exclude could be invoked.⁴⁶

However, it seems that during the course of the present century these two separate but associated grounds for the exclusion of "voluntary" confessions were conflated into one which existed independently of the Rules. Thus, while the Rules, in either their original or amended forms, did not precisely determine the criteria upon which the judicial discretion should be exercised,⁴⁷ a number of rulings made clear that the discretion to reject legally admissible evidence would be invoked, not merely on the basis of a breach of the Rules, but only if it were obtained by improper or unfair means or if its prejudicial effect outweighed its probative value.⁴⁸

Indeed, only six years after the formulation of the 1912 Rules, the Court of Criminal Appeal, in the case of *Voisin*,⁴⁹ established that a failure to observe the Rules would not *ipso facto* render any statements obtained inadmissible or necessarily provoke a judge to exercise his discretion to exclude.

The appellant had been requested to go to a police station. Detained in custody, he was asked questions in connection with the murder of a woman whose body had been found in a parcel with the words "Bladie Belgiam" written upon it. The appellant had not been cautioned. He was asked to write the words "Bloody Belgian" to which he wrote the words "Bladie Belgiam". The Court of Appeal ruled that:

⁴⁶ *Supra.*, n.34. See also Devlin, 1960, pp.35-40.

⁴⁷ Though see *Ibrahim* (1914) AC 599, *per* Lord Sumner, p.614; *Christie* [1914] AC 545, *per* Lord Moulton, pp.559, 560, 564, 569; *Gardner and Hancox* (1915) 80 JP 135; *Voisin* (1918) 13 Cr.App.R. 89, p.95, where Lawrence, J opined that a trial judge may exercise his discretion to exclude "only if he thinks the statement was not a voluntary one ... or was an unguarded answer made in circumstances that rendered it unreliable, or unfair, for some reason to be allowed in evidence against the prisoner."; *Brown and Bruce* (1931) 23 Cr.App.R. 56; *Dwyer* (1932) 23 Cr.App.R. 156. Also see Fry, 1938, p.445.

⁴⁸ *Noor Mohamed* [1949] AC 182, p.192; *Harris v. DPP* [1952] AC 694, p.707; *Kuruma* [1955] AC 197, p.204; *Cook* [1959] 2 QB 340; *Callis v. Gunn* (1963) 107 Sol.J. 831; *Ovenell* [1969] 1 QB 17, p.26; *Elliott* [1977] Cr.L.R. 551; *Houghton* [1979] 68 Cr.App.R. 197, p.206; *Sang* [1979] 2 All E.R. 1222, pp.1229-1247. See also Pattenden, 1981, pp.98-102.

⁴⁹ *Voisin* (1918) 13 Cr.App.R. 89.

It cannot be said, as a matter of law, that the absence of a caution makes the statement inadmissible.... the appellant wrote these words quite voluntarily. The mere facts that they were police officers, or that the words were written at their request, or that he being detained ... do not make the writing inadmissible in evidence. They do not tend to ... explain the resemblance between this handwriting and that on the label or account for the same mis-spellings.... There was nothing in the nature of a "trap" or the "manufacture" of evidence ... the police, though they were detaining the appellant in custody for inquiries, had not then decided to charge him with this crime....

It is desirable in the interests of the community that investigations into crimes should not be cramped.... Even if we disagreed with the mode in which the judge had ... exercised his discretion, which we do not, we should not be entitled to overrule his decision on appeal. This would be evidence admissible in law, unless it could be fairly inferred from other circumstances that it was not voluntary.⁵⁰

In failing to criticise the behaviour of the police, the effect of this decision was to sanction custodial interrogations and, indeed, the practice of detaining persons for the purpose of conducting police inquiries. It also made clear that the discretion of a trial judge, in this case exercised in favour of the reception of the evidence, was above review. It therefore revealed the Judges' Rules of 1912 to be ineffectual as a limitation on police powers for the "fair administration of justice".⁵¹

The case of *Cook*,⁵² also heard before the Court of Criminal Appeal in 1918, further illustrates the attitude the senior judiciary of the early part of the present century had adopted with respect not only to the meaning of voluntariness but also to the non-observance of the Rules by the police and the utility of police questioning to the interests of crime control. In this case it was argued for the appellant that once the first instance judge had, at the request of counsel for the defendant, excluded the statement made under police questions that judge should not, in summing up to the jury, have made comments adverse to the interests of the accused respecting the excluded statement. Giving the judgment of the Court Darling, J cited *Voisin* with approval and in dismissing the appeal added:

⁵⁰ *Ibid.*, pp.94-6. See also *Smith* [1961] 46 Cr.App.R. 51; *Massey* (1963) 107 Sol.J. 984; *Kennedy, Steele and Meakin* [1963] Cr.L.R. 108.

⁵¹ *Voisin, ibid.*, p.96.

⁵² *Cook* (1918) 34 LTR 515.

It would be a lamentable thing if the police were not allowed to make inquiries, and if statements made by prisoners were excluded because of a shadowy notion that if the prisoners were left to themselves they would not have made them.⁵³

It is not clear whether the statement the appellant had made to the police had been excluded in the exercise of the discretion of the trial judge or on the ground that it was made involuntarily, *Darling, J* nevertheless implied that the statement had been wrongly rejected.⁵⁴

For Neasey, it was the tendency of the courts, towards the end of the nineteenth century, to express the voluntariness doctrine in restricted terms that was largely responsible for the development of both the pre-Judges' Rules discretion to exclude "voluntary" statements and the Rules themselves.⁵⁵ Prior to the articulation of the Rules there had been a marked division of judicial opinion as to the admissibility of statements obtained under extra-judicial questioning, whether or not explicit threats or promises, had been used.

As the restricted conception of voluntariness came into prominence, so the judicial expedient of broadening the application of the voluntariness test declined. Following this development, however, the practice of excluding "voluntary" and therefore technically admissible evidence, in the exercise of a judicial discretion, emerged to supplement the narrowly drawn exclusionary rule of evidence and to begin to meet its inability, in the face of the investigatory practices employed by the "new" police, to ensure confessions were indeed voluntarily given.⁵⁶ As Lord Sumner remarked:

When judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law.⁵⁷

Here the Judicial Committee of the Privy Council appear to accept that some judges considered the exclusionary rule to be expressed too narrowly to be capable of proscribing coercive methods employed by the police falling short of direct threats or promises.

⁵³ *Ibid.*, p.516.

⁵⁴ *Ibid.*

⁵⁵ Neasey, 1969, pp.485, 489.

⁵⁶ See *Berriman* (1854) 6 Cox C.C. 388; *Gavin* (1885) 15 Cox C.C. 656; *Male* (1893) 17 Cox C.C. 689; *Histed* (1898) 19 Cox C.C. 16, at p.17; *Knight and Thayre* (1905) 20 Cox C.C. 711, p.713.

⁵⁷ *Ibrahim* (1914) AC 599, p.611.

Further, it is implied that the discretion to exclude statements not offending against the voluntariness rule subsisted independently of that exclusionary rule of law.

Together, therefore, the 1912 and 1918 Judges' Rules, in reflecting the narrow construction that had come to dominate the evidential requirement of voluntariness, may be seen as an attempt on the part of the senior judiciary - acting in concert with the executive - to bring formerly divergent judicial attitudes to the admissibility of confession statements obtained by the police within a quasi-corporate framework. Roughly corresponding to the organisational structures of business, the trade union movement and the professions of nineteenth and early twentieth century industrial capitalism, the judicial community, when seen as a corporate body shaping and representing the consensus view of its members and its collectively determined policy regarding the exercise of the discretion to exclude, can be contrasted with the largely autonomous and individualised judiciary of the early nineteenth century. The corporatised judiciary through the Judges' Rules, coupled with the narrow scope of the peremptory exclusionary rule and the appellate jurisdiction of the Court of Criminal Appeal, effectively provided the means to regularise the practice of trial judges in respect of the reception in evidence of "voluntary" confessions elicited through police questions though it was less effective in establishing firm and enforceable guidelines for both regulating police methods and for the fair treatment of suspects.⁵⁸ It is clear, however, that the Rules represented a decisive step in the legitimisation of custodial interrogations by the police.

This is apparent when it is considered that should a judge choose to exercise his discretion in favour of admitting in evidence incriminatory statements made in answer to questions put to the accused whilst he was detained in police custody - and in contravention of the Judges' Rules - the accused was afforded little in the way of relief.⁵⁹ Indeed, it was clear that the Court of Criminal Appeal would not "quash the conviction thereafter obtained if no substantial miscarriage of justice had occurred."⁶⁰ In short, outside of the attenuated though nonetheless mandatory exclusionary rule of law and the residual discretion to exclude, there were no sanctions against improper custodial questioning or the use of coercive methods, not recognised by the voluntariness test, to

⁵⁸ For the view that the Judges' Rules, rather than regulating the exercise of the judicial discretion, served to regulate police methods of inquiry and to ensure accused persons received a fair trial, see Devlin, 1960, pp.31-9.

⁵⁹ See *Voisin*, *supra*. n.49.

⁶⁰ *Ibrahim* (1914) AC 599, p.614.

procure confessions. A policeman who failed to observe the Rules did not commit an offence, either civil or criminal, punishable by the courts.⁶¹

Thus, the quasi-legal status of the Rules as unenforceable advice to the police, providing no redress for persons questioned in breach of them, served - as a result of their ambiguous and contradictory provisions - both to legitimate the practice and obscure the origins of the police power to interrogate suspects in custody. As Devlin pointed out, the Rules were not only constructed in a piecemeal fashion they were "lengthy", "repetitive" and the whole did "not constitute a well drafted document."⁶² Their limited scope and lack of conceptual clarity stemmed from their failure to define or distinguish the practical operation of arrest in relation to charge. This permitted the inference that the questioning of persons detained in custody was permissible so long as the caution had been administered.⁶³ The imprecise and internally inconsistent nature of the Rules which worked to allow this inference can also be attributed to the assumption that the investigative and accusatory stages of the criminal process could be clearly segregated from each other.

By their terms the Rules were intended to place restraints on police inquiries into crime once the accusatory stage of the prosecution process had arrived. Prior to this stage an officer could address questions to "any person or persons whether suspected or not" from whom he believed useful information may be obtained.⁶⁴ The Rules implied that on the arrival of the accusatory stage, the police were to issue the usual caution and refrain from questioning suspects because it would be *unfair* to interrogate a suspect after this point.⁶⁵ However, the Rules were ambiguous as to whether the entrance of the accusatory stage coincided with the suspect being arrested, being taken into formal custody, or his being charged.⁶⁶ Indeed, in contradiction to the suggestion that custodial interrogations offended against the common law implicitly incorporated by the Rules, Rules 2 and 3 when read together carried the clear implication that police constables enjoyed a discretion to determine when the restrictions contemplated by Rules should operate.⁶⁷

⁶¹ Smith, 1960, p.348; Teh, 1972, p.491.

⁶² Devlin, 1960, p.33. See also 73 (1) *Sol. J.*, 1929, p.245; Gooderson, 1970, p.272; Jackson, 1972, p.102.

⁶³ See *Massey* (1963) 107 *Sol.J.* 984, *per* Parker, LCJ, p.985.

⁶⁴ Rule 1. See also Devlin, 1960, pp.27-8, 31; Brownlie, 1960, p.306.

⁶⁵ See *Straffen* [1952] 2 All E.R. 657, p.658.

⁶⁶ See Brownlie, 1960, p.307; Teh, 1972, p.493.

⁶⁷ See Rule 2 and 3, *supra.*, n.23.

The two Rules effectively "left to the sense of fairness of the police officer"⁶⁸ the point at which individuals became accused persons to be cautioned against incriminating themselves and implied that custodial questioning was permissible provided it was preceded by the caution. This construction not only appeared to conflict with the common law position as described in 1911 by Avory, J in *Winkle*,⁶⁹ it was also apparently inconsistent with Rule 7, which indicated that a prisoner "must not be cross-examined" and that "no questions should be put to him".

In respect of the phrase "made up his mind to charge", Devlin argued that this meant that the accusatory stage of the prosecution process was to commence "whenever the evidence in the possession of the police had become sufficiently weighty to justify a charge".⁷⁰ In spite of this suggestion that Rule 2 carried an objective element which could be *ex post facto* assessed by the courts, it is clear that the essentially subjective test contemplated by the Rule enabled the police to postpone the decision to charge where it was felt that to do otherwise would hinder their investigations.⁷¹

"Almost inevitably," Williams observed, "the police will continue questioning until they have not merely sufficient evidence for making an arrest, but sufficient evidence for securing a conviction."⁷² He also suggested that even if judges were prepared to exclude all evidence obtained in violation of the Rules, the practice would continue since "the practice of questioning would still offer substantial advantages to the police in the enforcement of the law."⁷³ This view is supported by the consideration that should a full confession of guilt prove forthcoming, the police could attempt to persuade the author to plead guilty at his trial.⁷⁴ Not only would this preclude any judicial inquiry into possible

⁶⁸ Mead, 1935, p.499. See also Williams, G., 1960a, p.327.

⁶⁹ *Winkle* (1911) 76 JP 191. Avory, J ruled that the police had no authority to conduct cross-examinations of persons detained in custody. See also *Mathews* (1919) 14 Cr.App.R. 23; *Grayson* (1921) 16 Cr.App.R. 7, p.8, where the Lord Chief Justice denounced what amounted to "an informal preliminary trial in private by the police" which was "not in accordance with the principles of English justice" and not "fair to prisoners". Also see *Taylor* (1923) JP 87; *Brown and Bruce* (1931) 23 Cr.App.R. 56.

⁷⁰ Devlin, 1960, p.29.

⁷¹ See *Voisin* (1918) 13 Cr.App.R. 89, p.95; RCPMP, *Report*, 1929, para.151, p.56; Williams, G., 1960a, p.327; *Sergeant* [1963] Cr.App.R. 848; Teh, 1972, p.494.

⁷² Williams, G., 1960a, p.327. See also St. Johnston (Chief Constable), 1948, p.95, who spoke of the "temptation ... for an officer who knows he has the right man, and who knows the evidence against him is not strong, to delay giving the caution in the hope that the suspect will incriminate himself still further."

⁷³ Williams, G., 1960a, p.328.

⁷⁴ See RCPMP, 1929, *Report*, pp.104-5.

breaches of the Rules, it would avoid an assessment of the "voluntariness" of the confession and render the trial itself unnecessary, leaving prosecutions to proceed to conviction. As the 1928-9 Royal Commission pointed out:

... the effect of a plea of guilty is to relieve the Police of the task of proving the case, when their evidence may be weak or incomplete.⁷⁵

Furthermore, were the accused to plead not guilty, a custodial confession to the police might provide "leads" for the police to pursue in order to secure other admissible evidence even though the confession itself may be rejected by the court at trial. It is, therefore, difficult to counter the contention that it was "unrealistic" to suppose that the police would refrain from questioning persons detained in custody merely because there was some chance that they would be prevented from making direct use of any confessions obtained by the sanction of exclusion.⁷⁶

To the extent, therefore, that the 1912, 1918 Judges' Rules aimed to proscribe custodial questioning by the police; to establish clear guidelines for the procurement of statements by the police; to ensure those statements, when tendered in evidence, were voluntary; and to safeguard the privilege against compulsory self-incrimination purportedly afforded to accused persons, each of these objectives were to prove elusive. The framers of the Rules apparently failed to fully appreciate the key role the police played in the prosecution process of the early twentieth century.

Historically, there had been a general assumption that arrests would not be made until criminal investigations were complete. Arrests were ordinarily made for the purpose of accusation or charge, so that invariably arrests coincided with charge and signalled the end of the investigatory and the beginning of the accusatory or judicial stage.⁷⁷

Charged to direct investigations, to manage prosecutions and having the authority to issue warrants for the apprehension of suspects, the justice of the peace was the central figure in the pre-trial process.⁷⁸ The arrestee would be brought, without delay,⁷⁹ before the

⁷⁵ *Ibid.*, para.275, p.104.

⁷⁶ *Ibid.*, p.328. See also Brownlie, 1960, pp.307-24; Smith, 1960, pp.347-49; Williams, C., 1960, pp.353-5; Fellman, 1966, p.44; Leigh, 1975, p.145; McBarnet, 1981c, pp.109-11.

⁷⁷ Lidstone and Early, 1982, pp.501-2.

⁷⁸ 1 Stephen, 1883, p.497; Howard, 1931, pp.48-9, 381-2.

⁷⁹ 1 Chitty, (1816, p.59): "When the officer has made his arrest, he is, as soon as possible, to bring the party to the gaol or to the justice ... and if he be guilty of unnecessary delay, it is a breach of duty."

justice, typically by subordinate officers such as parish constables or watchmen, for examination in the inquisitorial manner directed by the Marian statutes.⁸⁰

The rise of the "new" professionalised police in the early part of the nineteenth century altered this pattern. At the outset the police were instituted as a preventive body and the function of establishing a *prima facie* case against a suspected person remained within the province of the justices. However, investigative activities became incompatible with the increasingly judicial status and function of the magistracy as the professionalised police forces became established. The elevation of the justice into a quasi-judicial figure was formalised under Jervis' Acts in 1848.⁸¹

With this the magisterial control of the investigative process became comparatively remote, while the police progressively assimilated both the investigatory and accusatory functions previously held by the justices.⁸² The Indictable Offences Act of 1848,⁸³ designed to regulate the taking of statements from suspects during preliminary hearings, formally extended the privilege against compulsory self-incrimination - which had brought the judicial interrogation of prisoners to an end - from trials before the judges to preliminary examinations before magistrates.⁸⁴ The statute, however, did not bring the duties of the new police directly within its ambit. The procurement of extra-judicial statements from accused persons by the police was left to the judicially evolved evidential requirement, applicable to the magistrates and the police equally, that such statements be given voluntarily.

In order to facilitate the reception in evidence of confessions alleged to have been voluntarily made, the police adopted the caution, developed by magistrates and made binding upon them by the 1848 Act,⁸⁵ as a means of satisfying the courts that the accused was informed of his "right to silence", that is, that he was under no obligation to make a statement or to accuse himself.⁸⁶ Nonetheless, by about this time the police had, without express statutory or judicial authority, become the initiators of criminal investigations,

⁸⁰ 1 & 2, P.& M., c.13 (1554); 2 & 3, P.& M., c.10 (1555). See 1 Stephen, 1883, p.225; Langbein, 1974, pp.22-4; Beattie, 1986, p.271.

⁸¹ 11 & 12 Vict., cc.42, 43 & 44 (1848).

⁸² See 1 Stephen, 1883, pp.496-8; Beard, 1904, pp.165-7; Howard, 1931, p.48-9.

⁸³ 11 & 12 Vict., c.42 (1848).

⁸⁴ *Ibid.*, s.18. See 1 Stephen, 1883, p.441.

⁸⁵ *Ibid.*

⁸⁶ See 1 Chitty, 1816, p.85. See also RCPMP, *Report*, 1929, para.64, p.26; pp.142-3.

exercising the power to arrest, without a warrant, on the basis of "reasonable suspicion", to detain individuals at police stations, to charge, to determine the nature of the charge, to decide when to charge, to release or bail prisoners, to construct the case against those they accused and to prosecute that case to conviction.⁸⁷

In the context of the acquisition of voluntary confessions, judicial opposition to the extra-judicial and crime control functions the police had acquired expressed itself in the assertion that as the judiciary and magistracy were prohibited from putting questions to accused persons inviting incriminatory replies, so too were lesser officers of the law prohibited from questioning persons accused or about to be accused of involvement in crime. As Channell, J put it to police officers:

You are entitled to ask questions for your information, as to whether you will charge the man, but the moment you have decided to charge him and practically get him into custody, then in as much as the judge even can't ask a question or a magistrate, it is ridiculous to suppose that a policeman can.⁸⁸

This attitude was consistent with a concern that to permit persons to be interrogated in custody, without the presence of an independent observer, would be to undermine their privilege against self-incrimination. To a limited extent, the Judges' Rules appeared to incorporate this conception of the criminal process in their apparent recognition that the police might question persons in order to determine whether to charge provided such persons were not in custody.⁸⁹ However, not only was "custody" a nebulous and ill-defined construct, the framers of the Rules appeared not to recognise the scope they afforded the police to detain suspects for the purpose of putting questions.

This - despite the "extraordinary powers of interrogation" the police enjoyed during the First World War under the Defence of the Realm Acts,⁹⁰ which, it was suggested in 1928⁹¹

⁸⁷ See 1 Stephen, 1882, pp.193-4; 72 JP, 1908, pp.75-133; Sol.J., 1928, p.406; Howard, 1931, pp.15-19.

⁸⁸ Lidstone and Early (1982, p.502) attribute this statement to Channell, J without making its source entirely clear. However, Channell, J is reported as having made similar remarks in *Knight and Thayer* (1905) 20 Cox C.C. 711, p.713; 69 JP 108; 21 TLR 310. For equivalent nineteenth century dicta see *Bodkin* (1863) 9 Cox C.C. 403; *Yeovile Murder Case* (1872) 41 JP 187; *Reason* (1872) 12 Cox C.C. 228, p.229; *Gavin* (1885) 15 Cox C.C. 656, p.657; *Thompson* (1893) 17 Cox C.C. 614; *Male* (1893) 17 Cox C.C. 689, p.690; *Histed* (1898) 19 Cox C.C. 16, p.17.

⁸⁹ Rule 1. See also Brownlie, 1960, p.306.

⁹⁰ Of which Regulation No.53 provided that: It shall be the duty of any person, if so required by an officer, or by a soldier, sailor or airman engaged on sentry patrol or other similar duty, or a police constable ... to stop and answer to the best of his ability and knowledge any questions which may be reasonably addressed to him, and if he fails to do so he shall be guilty of an offence against these regulations.

- allowed the police to develop investigative methods that both survived the annulment of those Acts in 1921⁹² and were not suppressed by the Judges' Rules. As Lidstone and Early suggest, the Rules were posited on a "naive view of the investigation of crime," one which supposed that the police did not "appreciate the effectiveness of custodial interrogation."⁹³ Furthermore, it was a view that appeared not to recognise that the logic of the adversarial nature of the prosecution process was such that the police saw custodial interrogations as a legitimate means to effectively discharge their mandate of gathering evidence to prove the guilt of persons they suspected or accused of involvement in crime.⁹⁴

The Report of the 1928-9 Royal Commission

The uncertainties of interpretation and of practice were examined by the 1928-9 *Royal Commission on Police Powers and Procedure*⁹⁵ set up after the public alarm occasioned by the police interrogation of Miss Savidge⁹⁶ and appointed to "consider the general

⁹¹ See the Minority Report of the *Tribunal of Inquiry in Regard to the Interrogation by the Police of Miss Savidge*, 1928, Cmd.3147, (Savidge Inquiry Report) p.31. See also RCPMP, *Report*, 1929, p.101.

⁹² The Acts were repealed by Order in Council in August, 1921, under the Termination of the Present War (Definition) Act, 1918.

⁹³ Lidstone and Early, 1981, p.502. See also Devlin (1960, pp.29, 67-68) who, in his assessment of the mid-twentieth century prosecution process, was of the view that suspects were invariably charged immediately upon their arrival in formal custody at a police station. Williams, G. (1961, p.54) confirms that even by this late date, it was still widely assumed that the police assembled their evidence *before* making an arrest and, therefore, infrequently detained persons in order to elicit confessions of guilt.

⁹⁴ See RCPMP, *Report*, 1929, para.151, p.56, where it is recorded that the police defended this practice as being "essential in the interests of justice." See also Mead (1935, pp.499-500), a former Metropolitan Police Magistrate, who expressed opposition to the caution on the ground that it gave suspects detained in police custody "a momentary opportunity to reflect" which was to the disadvantage of the prosecution and impaired what he described as the duty of a police officer "to prove the guilt of an accused person" when it was "essentially in the interests of the public that he should succeed."

It is noteworthy that the earlier Royal Commission on the Duties of the Metropolitan Police (1906-8, Cd.4156, p.75) found it necessary in its report to remind police officers that, respecting individuals detained in custody, the police were required to discharge "an executive and not a judicial function." That is, to ascertain whether there was a *prima facie* case against the prisoner and not to determine the issue. See also RCPMP, *Report*, 1929, paras.137-41, pp.51-3, and compare Devlin, 1960, p.28.

⁹⁵ Cmd.3297.

⁹⁶ Miss Savidge had been arrested, with Sir Leo Money, by two Metropolitan police officers for "behaving in a manner reasonably likely to offend against public decency." The charge was dismissed by a magistrate. Questions on the matter were raised in the Commons, after which the Home Secretary referred the case to the Director of Public Prosecutions (DPP) with instructions to investigate whether the two

powers and duties of police in England and Wales in the investigation of crimes and offences ... to inquire into the practice followed in interrogating or taking statements from persons interviewed in the course of the investigation of crime; and to report whether ... such powers and duties are properly exercised and discharged, with due regard to the rights and liberties of the subject, the interests of justice, and the observance of the Judges' Rules both in the letter and the spirit; and to make any recommendations necessary...."⁹⁷

The Commission accumulated a "conspicuous conflict of evidence" suggesting police practice varied in respect of the questioning of persons in custody under the Rules.⁹⁸ It observed that the "great majority" of police forces from which it received evidence claimed to follow the advice promulgated by Lord Brampton and to regard it as the "fundamental principle" governing their practice.⁹⁹ The Commission viewed this advice as reflecting existing "best practice".¹⁰⁰ However, that evidence also suggested that some forces "limit the application of the principle to the charge for which the prisoner is in custody, and approved of the questioning of prisoners regarding any other offence."¹⁰¹ While others claimed "a right to question prisoners on the charge for which they are in custody, although even these agreed that it should be done very sparingly."¹⁰²

officers could be proceeded against for perjury. As part of the DPP's investigations, it was felt necessary to "ascertain" the characters and reputations of Sir Leo Money and Miss Savidge - who were potentially the principal witnesses for the prosecution - together with the circumstances of their association. (The DPP had considered it "strange that a person of Sir Leo Money's position should be associating with a young woman in a different station of life".) Subsequently, Miss Savidge, aged 22, was approached by police officers at her place of employ and invited to accompany them to Scotland Yard. She had asked to go home first but as the police did not consider this to be a "definite request" it was not conceded to. On arrival at Scotland Yard, she was taken for private interrogation, with no one else present except the police, and questioned in contravention of the Judges' Rules. The methods by which her presence was secured by the police and the events attending her interrogation - alleged to have been designed both to assist the two police officers resist a charge of perjury and to elicit information on which she could be discredited - resolved both Houses of Parliament to establish a tribunal to inquire into what was described as "a definite matter of urgent public importance." The tribunal reported in July, 1928 (Savidge Inquiry Report, Cmd.3147). The RCPMP was expressly directed to consider the points raised by the tribunal's Minority Report, (pp.17-33) written by Lees-Smith MP, which was not only critical of the treatment by the police of Miss Savidge but also of the "mechanical precision with which the ... police witnesses corroborated every detail of each other's statements".

⁹⁷ RCPMP, *Report*, p.ii.

⁹⁸ *Ibid.*, para.161, p.60.

⁹⁹ *Ibid.*, para.162, p.60.

¹⁰⁰ *Ibid.*, para.137, p.51.

¹⁰¹ *Ibid.*, para.162, p.60.

¹⁰² *Ibid.*

The Commission focused upon three procedural devices that enabled the police to question persons in custody in violation of the common law and the Judges' Rules. The first, the "delayed charge". The Commission thought that the practice of holding a person in custody after arrest and before he has been formally charged should be subject to definite limits and safeguards.¹⁰³ However, it suggested that the practice was "often of advantage to the person arrested" who, if innocent, could direct the police to evidence which would induce his release without the stigma of an appearance in court.¹⁰⁴ This suggestion amounts to an endorsement of the presumption of guilt carried by the police in regard to those arrested. The suspect, who in legal theory is to be presumed innocent until proved guilty in court,¹⁰⁵ is effectively placed under an obligation to prove his innocence to the satisfaction of his captors. The Commission, however, recommended that the prisoner should know exactly where he stands as soon as possible after arrest. In this regard the station officer, whose duty it is to accept or refuse the charge presented to him by the arresting officer, should either admit the prisoner to bail prior to formal charging for the purpose of continuing the investigation,¹⁰⁶ or ensure that he is brought before a court "as soon as practicable."¹⁰⁷

Secondly, the Commission was critical of the unauthorised practice under which the police detained persons in custody to deliberately differentiate "detention on suspicion" from arrest, to evade the provisions of the Judges' Rules. It argued that the practice was "undesirable and unnecessary".¹⁰⁸ Similarly, respecting the police practice of detaining several suspects for questioning while their respective accounts were verified so as to eliminate the innocent and incriminate the culprit, the Commission thought this to be forcing suspects "to prove their innocence under the threat of continued detention."¹⁰⁹ It therefore had "no hesitation" in concluding that the practice was "wrong both in law and principle and should not be employed."¹¹⁰ In connection with the "clear evidence" it had received indicating that "detention" was regarded by the police as something less than

¹⁰³ *Ibid.*, para.143. p.53.

¹⁰⁴ *Ibid.*, para.142, p.53.

¹⁰⁵ See *ibid.*, para.132, p.49.

¹⁰⁶ By authority of the Criminal Justice Act, 1925, s.45.

¹⁰⁷ As required by the Criminal Justice Administration Act, 1914, s.22.

¹⁰⁸ RCPMP, *Report*, 1929, para.158, p.59.

¹⁰⁹ *Ibid.*, para.154, p.57.

¹¹⁰ *Ibid.*, para.154, pp.57-8.

arrest allowing them to question freely without administering the caution, the Commission referred to a clarificatory memorandum submitted to it by the Home Office. The memorandum stipulated that:

The word 'detention' is not a term of art, though it is used by some Police forces with a special restricted significance not recognised by other Forces. The technical term is imprisonment. Any form of restraint by a police officer ... is in law imprisonment.... Whether the imprisonment or 'detention' is initiated by words or action constituting technically an arrest is for this purpose immaterial, nor is it material for the purpose of Rule (3) of the Judges' Rules. *Any person who is in fact under restraint and knows he is under restraint should be treated as in custody within the meaning of that Rule.*¹¹¹

Finally, with respect to the practice of arresting individuals on a minor or holding charge pending further inquiries, an alternative procedural device which enabled the police to question detained persons in contravention of the Judges' Rules - and one which the Director of Public Prosecutions had, in giving evidence to the Commission, defended as "from the point of view of the public ... a first-rate procedure"¹¹² - the Commission argued that "deliberate recourse to this practice, which contains elements of subterfuge, is on principle to be deprecated."¹¹³

Satisfied that police practice lacked uniformity and in the light of the "unsettled" case law regarding custodial questioning,¹¹⁴ the Commission sought to:

prescribe a clear working rule for the police based on the fundamental to our criminal law, that "no one should be compelled to incriminate himself."¹¹⁵

From this perspective, one which suggests the right to silence should not be subverted by the crime control interests of the police, the Commission formed the view that persons in custody, because of their position in relation to their custodians, were at a disadvantage and - in spite of the issuance of the caution, which, it was suggested, had become no more

¹¹¹ *Ibid.*, para.148, p.55 (emphasis supplied).

¹¹² *Ibid.*, para.159, p.59.

¹¹³ *Ibid.*, para.160, p.59.

¹¹⁴ See *Ibrahim* (1914) AC 599, cited in the RCPPP, *Report*, p.61.

¹¹⁵ RCPPP, *Report*, para.164, p.61.

than a hallowed shibboleth¹¹⁶ - in practical rather than theoretical danger of being compelled to incriminate themselves. It, therefore, concluded that it was "desirable to avoid any question at all of persons actually in custody".¹¹⁷ Accordingly, the Commission called for:

a rigid instruction to [be issued to] the police [making it clear] that no questioning of a person in custody, about any crime or offence with which he is or may be charged, should be permitted.¹¹⁸

Responding to the Report of the Commission,¹¹⁹ in 1930 a Home Office circular was issued with the approval of the judiciary. It explained that:

Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody, and long before this rule was formulated, and since, it has been the practice for the Judge to not to allow any answer to a question so improperly put to be given in evidence.¹²⁰

Despite the circular, the custodial questioning of suspects by the police continued.¹²¹ Indeed, the circular itself provided tenuous examples of "exceptional circumstances" in which post-caution questioning might be justified.¹²²

¹¹⁶ *Ibid.*, paras.64-75, pp.25-9. The Commission also found that its witnesses agreed that the caution had "little or no effect" on the mind of an experienced criminal and that "new offenders", particularly women, regarded it "as unfriendly or discourteous interposition in an interview" (para.70, pp.27-8). Nevertheless, the Commission recommended that the caution be administered "at the very outset of any questioning," (paras.69, 72-5, pp.27-39) as a safeguard against it being "used or varied for tactical reasons" (para.68, p.27). For it found it "difficult to appreciate the value or ethics of a caution which is deliberately withheld until the suspect has succeeded in incriminating himself sufficiently to justify arrest" (para.69, p.27).

¹¹⁷ *Ibid.*, para.165, p.61. The Commission later qualified the suggestion of an absolute proscription against custodial questioning when (at para.166, p.62) it stated "that a prisoner should not be questioned on matters connected with the charge for which he is in custody." And see para.174, p.66, where it accepts that questions to clear up ambiguities are permissible.

¹¹⁸ *Ibid.*, para.169, p.65.

¹¹⁹ See *Powell-Mantle* [1959] Cr.L.R. 445, "Commentary", p.447; MacDermott, 1968, p.13.

¹²⁰ Home Office Circular No.536053/23, June, 24, 1930. See also Brownlie, 1960, p.299.

¹²¹ See, for example, *Brown and Bruce* (1931) 23 Cr.App.R. 56; *Wattam* (1952) 36 Cr.App.R. 72; *May* (1952) Cr.App.R. 91; *Bass* [1953] 1 QB 680; (1953) 36 Cr.App.R. 51; *Thomas and Cullen* (1961) Crim.L.R. 401; *Parman* (1963) 107 Sol.J. 984; *Sargeant* (1963) Cr.App.R. 848; *Massey* (1964) Crim.L.R. 43. See also Greaves, 1936, pp.17-19; Brownlie, 1960, p.320; Williams, G., 1960a, p.329; Smith, 1960, pp.348-56; Williams, C., 1960, pp.353-55.

The circular purported to make clear that post-caution custodial questions were justifiable only when in accordance with Rule 7: "for the purpose of removing ambiguity". However, neither the Rules nor the circular unambiguously proscribed custodial questioning and, in the opinion of a former Metropolitan Police Magistrate, the "sanction of questions to remove ambiguities constitute[d] a most dangerous loophole for cross-examination of prisoners by the police."¹²³ Indeed, the Rules were so interpreted by the courts that it remained possible to evade the constraints they ostensibly provided by the simple police expedient of regarding those detained without being formally arrested or charged as "helping with inquiries". Such persons though in *de facto* custody continued to be vulnerable to incriminatory questions which breached the Rules.¹²⁴

The continued equivocacy of the Rules led some commentators to insist that it was "difficult to resist the conclusion that Rule 3 of the Judges' Rules means precisely what it says and that the questioning of persons already in custody is permissible provided a caution is first administered."¹²⁵ Others, while accepting that a person should not be questioned upon the crime for which he was in custody, felt that "this was never intended to be applied to other crimes. If this was the case not only would it act to the detriment of the prisoner but to the community as a whole."¹²⁶ Another argued that it was "ludicrous to suggest that the police have no right to question a prisoner or person in custody about any crime or offence with which he is or may be charged. Police officers must question prisoners.... They would be failing in their duty in the 'prevention and detection of crime' if they did not ask a prisoner questions about other offences he may have committed."¹²⁷

That judges tended to acquiesce in the face of continued police breaches of the Rules, to the extent that the Rules had virtually ceased to exist as a constraint on the police practice of questioning persons in custody, was commented upon by Williams who noted that:

... detention for questioning, and questioning after arrest, are still practiced by some police forces without serious check. To add to the anomaly, it seems from reported cases that the judges have given up

¹²² *Supra.*, n.120: A person arrested for burglary may, before he is formally charged, say "I have hidden or thrown the property away", and after caution he would properly be asked "where have you hidden or thrown it?" See Gooderson, 1970, p.273.

¹²³ Mead, 1935, p.499.

¹²⁴ See Teh, 1972, pp.494-500.

¹²⁵ Campbell (Colonel), 1959, p.675.

¹²⁶ Packman (Inspector), 1959, p.675.

¹²⁷ Payne (Detective Sergeant), 1959, p.676.

enforcing their own rules, for it is no longer the practice to exclude evidence obtained by questioning in custody.¹²⁸

The judicial reluctance to exclude such evidence appears to have become entrenched after the Second World War and could be justified, following the precedent set by *Voisin*,¹²⁹ on the basis that confessions considered to be "voluntary", in the legally accepted sense of the word,¹³⁰ were admissible in spite of their being obtained in breach of the Judges' Rules. As Devlin commented:

The essence of the thing is that a judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence ... if he is not so satisfied, he will admit the evidence even though there may have been some technical breach of the Rules.¹³¹

The judicial reasoning that saw the custodial questioning of persons - irrespective of whether the accused had been warned of the danger of incriminating himself - as of itself an insufficient ground upon which to exclude ostensibly reliable evidence was also noted by Williams who observed of statements obtained in breach of the Rules that "since about 1950 they have almost uniformly been admitted."¹³² A survey of the case law pre-dating the first Judges' Rules indicates that this reasoning had long enjoyed the support of a substantial number of judges.¹³³ When seen against the background of that case law it becomes clear that from the outset the Rules were of marginal importance both in respect of the evidential reception of confessions and as a means of placing enforceable limits upon police powers and practices.¹³⁴ This was largely a product of their being subject to the overriding common law requirement that obliged judges to exclude extra-judicial

¹²⁸ Williams, G., 1960a, p.331. See Hiemstra (1963, p.206) who contended that "the judges themselves [had] emasculated the Judges' Rules."

¹²⁹ *Voisin* (1918) 13 Cr.App.R. 89.

¹³⁰ The 1928-9 Royal Commission "received a volume of responsible evidence" which it found "impossible to ignore" suggesting a number of voluntary statements were "not 'voluntary' in the strict sense of the word." (RCPPP, *Report*, para.268, p.101.)

¹³¹ Devlin, 1960, p.38.

¹³² Williams, G., 1960a, pp.331-2; 1961, p.52. See also Williams, C., 1983, p.241.

¹³³ See chapters 5 and 6, above.

¹³⁴ See Brownlie, 1960, pp.323-4; Williams, C., 1960, p.354; Leigh, 1975, p.145.

statements only when they offended against the narrowly drawn voluntariness test affirmed by Lord Sumner in 1914.¹³⁵

Although the discretion to exclude gave the courts latitude to soften the severity of the circumscribed voluntariness test where the probative value of a confession appeared slight when weighed against its unfair or prejudicial effects,¹³⁶ that discretion was rarely invoked.¹³⁷ Furthermore, as non-compliance with the Rules was regarded as amounting to no more than "technical" or "excusable" breaches,¹³⁸ the protections they impliedly afforded detained and legally innocent persons from being conscripted into assisting their adversary in securing their own conviction, were weakened by the absence of an automatic mechanism to effectuate their implementation.

In light of the social and crime control utility of custodial interrogations, together with the judicial unwillingness or inability to enforce their own rules,¹³⁹ it may be concluded that the 1912 and 1918 Rules, which survived until 1964, could not have had anything more than a minimal impact upon the treatment of persons detained in custody by the police whose activities, under the logic of the adversarial process, remain geared to securing evidence that is both suitable for initiating prosecutions and capable of sustaining convictions.

Put briefly then, an assessment of the period comprising the late 1800s through to the mid-1900s reveals that the questioning of persons detained in the custody of the police in England and Wales had been fundamentally recast. It was, at the beginning of this period, a practice which was devoid of conclusive legal authority, provoking adverse comments from some judges and frequently resulting in the rejection of any statements obtained. By the close, it had become, under the 1912 and 1918 Judges' Rules and the associated judicial rulings, a legitimised feature of the criminal process which effectively permitted the police to require detainees to establish the truth or falsity of the suspicions held against them.¹⁴⁰

¹³⁵ *Ibrahim* [1914] AC 599, p.609.

¹³⁶ Devlin, 1960, pp.35-6.

¹³⁷ Walsh, 1982, pp.42-3; Zuckerman, 1989, p.313.

¹³⁸ Devlin, 1960, pp.37-9; Fellman, 1966, p.48.

¹³⁹ With the emergence of the Judges' Rules, representing the composite view of the senior judiciary, the scope for individual judges to extend the voluntariness test (upon which the Rules were posited) beyond the legally recognised inducements of threats or promises was curtailed. See chapter 7, above.

¹⁴⁰ See McBarnet, 1981b, p.57; Lidstone and Early, 1982, pp.448-9, 496-7.

Notwithstanding the implicit acceptance of the essentially crime control advantages to prosecutions of pre-charge detention and interrogation, the legitimating rhetoric of due process, which emphasises the adversarial and accusatorial character of the criminal justice process rather than its inquisitorial features, continued to be celebrated. The adversarial model of criminal justice, it is said, derives its contours from the fact-finding mode of adjudication. It focuses upon the contest in court through which counsel for the accused and the Crown play out their mutually antagonistic roles, shaping the legal issues before a judge who acts as a neutral referee charged to contain those issues within evidential rules for the guidance of the jury.¹⁴¹

The accusatorial aspect of the process presupposes equality of power and resources between the adversaries.¹⁴² The accuser is required to adduce sufficiently persuasive evidence against the accused to enable the jury to deliver a verdict of guilt. The presumption of innocence - a core element of the adjudicative process and a by-product of the privilege against self-incrimination which is said to give content to the accusatory dimension of the criminal process¹⁴³ - ensures that the accused is to be treated as though he were innocent and that he need not assist those who would convict him.¹⁴⁴

It is clear, however, that these key interrelated tenets upon which Anglo-American criminal justice is said to rest,¹⁴⁵ firstly, are not pure or immutable features of the adjudicative process and, secondly, have not been fully translated into practice in the extra-judicial context in which the police operate.¹⁴⁶ Indeed, as Grano suggests, had there been a greater judicial willingness to envelope the pre-trial phase with the due process protections ostensibly afforded to accused persons at trial police interrogations would have been virtually eliminated.¹⁴⁷

The failure of the law to fully incorporate its due process rhetoric, therefore, may be attributed to the historical operation of the competing interests abstracted by Packer¹⁴⁸ into

¹⁴¹ See 2 Pollock and Maitland, 1898, pp.670-1; Griffiths, 1970, p.359; Goldstein, 1974, pp.1016-17; Lidstone and Early, 1982, p.500.

¹⁴² See, however, McBarnet, 1976, pp.172-201; Lidstone and Early, 1982, pp.500-501.

¹⁴³ Schaefer, 1966, p.507.

¹⁴⁴ Goldstein, 1974, pp.1017-18.

¹⁴⁵ See for example 1 Stephen, 1883, p.245; Howard, 1931, pp.1-11, 381-94; Jackson, 1972, p.98; McEwan, 1992, pp.3-29.

¹⁴⁶ See McBarnet, 1976, pp.173-88, 198-99.

¹⁴⁷ Grano, 1979, pp.868, 927.

¹⁴⁸ Packer, 1964; 1968.

opposing models: the Crime Control Model, which emphasises an informal, bureaucratic approach to the repression of criminal activity, and the Due Process Model, central to which is the provision of procedural safeguards at every stage of the criminal process to ensure the innocent are identified and excluded. Generally, the intrinsic tension between the ideals of due process and those of crime control have occasioned an uneasy compromise that has historically subordinated due process values to the imperatives of crime control.¹⁴⁹ Thus, while the rhetoric of due process holds that as a fundamental aspect of the adversarial and accusatorial process the law shall not disturb the mental freedom of individuals so as to compel them into becoming the instruments of their own conviction,¹⁵⁰ in reality the interests of crime control have worked, in respect of police powers of detention and investigation, to de-emphasise and qualify formal due process features in favour of informal procedures of an inquisitorial nature.¹⁵¹

During the two decades following the Second World War, as it became clear that the courts considered *Voisin*¹⁵² to represent the correct view of the law,¹⁵³ a number of learned commentators in addressing the inconsistencies between the rhetoric of the law relating to the procurement of confessions and the practical realities of law enforcement, called not for the practice of the law to correspond more closely with its rhetoric but rather for the rhetoric of the law to openly acknowledge and incorporate the realities of prevailing police practices. Williams,¹⁵⁴ for example, observed a "wide divergence between the standards of behaviour laid down in the Judges' Rules (and other judicial statements) and the actual conduct of the police."¹⁵⁵ He argued that the caution police officers were required by the

¹⁴⁹ See Packer, 1968, p.239.

¹⁵⁰ See, for example, *Blunt v. Park Lane Hotel Ltd* [1942] 2 KB 253, *per* Goddard, LJ, p.257; *Sang* [1979] 2 All ER 122, *per* Lord Diplock, p.1230b. See also RCPMP, 1929, Report, para.164; Sargant, 1957, p.184; JUSTICE, Report, [1960] Crim.L.R. 793; Hiemstra, 1963, p.194; Fellman, 1966, p.48; Schaefer, 1966, pp.507, 520; MacDermott, 1968, pp.2-6; Freedman, 1972, pp.102-117; McBarnet, 1976, pp.177-8, 186; 1981b, p.53.

¹⁵¹ See Packer, 1964, p.9; McBarnet, 1976, pp.172-9; Grano, 1979, pp.902, 913, 934; Lidstone and Early, 1982, pp.506-11.

¹⁵² (1918) 13 Cr.App.R. 89.

¹⁵³ That is, that infractions of the Judges' Rules would not *ipso facto* render statements obtained inadmissible. See Brownlie, 1960, pp.306, 324; Smith, 1960, p.347.

¹⁵⁴ Williams, G., 1960a, pp.325-46; 1961, pp.50-7.

¹⁵⁵ Williams, G., 1960a, p.325. See Brownlie (1960, p.324), also critical of the "divergence between the policy of the law on questions in custody and police practice." And see Smith (1960, p.349) who denounced the "superficial impression" that had been created suggesting strict compliance with the Rules was "compatible with effective law enforcement, when this is not the case."

Rules to administer to suspects merely paid lip service to the right to silence and in practice failed to safeguard that right.¹⁵⁶ In any event, the rule granting individuals immunity from answering police questions was "a rule which from its nature can protect the guilty only."¹⁵⁷

In a comment betraying his acceptance of the presumption of guilt intrinsic to the police practice of detaining the legally innocent for interrogation,¹⁵⁸ Williams also noted that "[f]ew *criminals* can remain completely silent under persistent questioning.... A considerable number will confess."¹⁵⁹ His contention that the rhetoric of the law was so divorced from its practice that the right to silence was meaningless to persons detained in police custody was supported by V. G. Hiemstra, a judge of the Supreme Court of South Africa, who argued for the abolition of the "limitations imposed by the Judges' Rules" in England.¹⁶⁰ Hiemstra considered the right to silence to be virtually non-existent because a person subjected to custodial questioning would invariably talk since "the atmosphere is one of encouragement to do so."¹⁶¹ There was, however, "another and more cogent reason why [such a person] will talk. It is the same reason which now prompts nearly every accused person to go into the witness-box at the close of the State case: fear of an adverse inference that could be drawn from silence in the face of accusation."¹⁶²

That neither the Judges' Rules nor the Home Office circular of 1930 were followed by the police or enforced by the courts was, Williams contended, simply because they were "incompatible with the successful performance of the function of the police."¹⁶³ He cited

¹⁵⁶ Williams, G., 1960b, p.50; 1961, p.325. See also Hiemstra (1963, p.205-6) who saw the caution as a potentially "serious handicap in the detection of crime". And argued that as it had become a "dead letter" it should be abolished. Also see Hoffman (1964, pp.24-5) who suggested the caution was an obstacle to the efficient investigation of crime because it discouraged the innocent from giving an explanation "which would have satisfied the police."

¹⁵⁷ Williams, G., 1963, p.53.

¹⁵⁸ See Barry, 1965, p.256.

¹⁵⁹ Williams, G., 1960a, p.340 (emphasis supplied). See also Devlin, 1960, p.50; 3 Wigmore, 1970, pp.524-26.

¹⁶⁰ Hiemstra, 1963, pp.187-218.

¹⁶¹ *Ibid.*, p.197. See also Grano, 1979, pp.897, 907.

¹⁶² Hiemstra, 1963, p.198. See also JUSTICE, Report, *supra.*, n.150, 1960, pp.798-9; Devlin, 1960, pp.50-1.

¹⁶³ Williams, G., 1961, p.50. See Jackson (1972, p.137) who doubted "whether the police could do their work efficiently if they did not develop practices for which there is no legal authority."

*Voisin*¹⁶⁴ in support of his assertion that breaches of the Rules by the police were "socially justified", even if they resulted in "a number of innocent persons [being] subjected to the inconvenience of detention in the police station", for this was a "lesser evil" than the evil of allowing offenders to escape.¹⁶⁵ Since the Rules presented "an unreasonable restriction upon the activities of the police in bringing criminals to book",¹⁶⁶ and as in practice the Rules had been "abandoned [with the] tacit consent"¹⁶⁷ of English Judges who "maintain in theory an idealist rule, while conniving at police practice",¹⁶⁸ the custodial questioning of individuals should be legalised.¹⁶⁹

Indicating that he considered the imperatives of crime control to be paramount, Williams also contended that for persons detained in the custody of the police "considerations of [the] liberty, dignity and privacy [of the individual] must give way to some extent to the practical necessities of law enforcement."¹⁷⁰ For this reason any proposal to give the detainee a "legal right to have his lawyer present while he is making a statement", should be resisted.¹⁷¹

Although Williams accepted that the 1912 and 1918 Rules operated imperfectly, he felt that to prohibit custodial interrogations would place an intolerable strain upon the self-

¹⁶⁴ *Supra.*, n.152.

¹⁶⁵ Williams, G., 1960a, p.333; 1961, p.52.

¹⁶⁶ Williams, G., 1961, p.52. See also Smith (1960, p.349) who believed that "[s]trict compliance with the Judges' Rules must be highly inconvenient for the police - and an undoubted handicap to them in their present task - and it is too much to expect them to enforce these very strict standards upon themselves."

¹⁶⁷ Williams, G., 1961, p.52.

¹⁶⁸ Williams, G., 1961, p.55. See also Williams, C., 1960, pp.354-6; Jackson, 1972, p.104.

¹⁶⁹ Williams, G., 1960a, p.341; 1961, p.55. See Smith (1960, pp.349, 351) who though seeing a "flaw in the argument of those who favour unlimited interrogation", namely that it "tends to assume the subject is guilty", nonetheless felt that if the police could not interrogate they "would not be able to do their job properly." Also see Hiemstra (1963, p.205) arguing that it was "obvious that police interrogation is completely indispensable in law enforcement. *It is necessary for the policeman to satisfy himself that he has sufficient grounds for arrest*, and is necessary to lead the police to accomplices." (Emphasis supplied.) And see St. Johnson, 1964, pp.89, 96.

¹⁷⁰ Williams, G., 1961, p.56.

¹⁷¹ Williams, G., 1961, p.56. In his earlier article Glanville Williams presented his opposition to legal advice in more measured terms. There, he accepted that the provision of legal assistance to detainees "would certainly operate as a substantial safeguard against illegality". However, in his view there was "one fact that makes it impracticable. As soon as a lawyer is introduced ... he advises his client to answer no questions. Thus if a lawyer were admitted the whole proceeding would be stultified." (Williams, G., 1960a, p.344.) See also Smith, 1960, pp.351-2; JUSTICE, Report, 1960, *supra.*, n.150, dissenting opinion of Foster QC., at p.819.

restraint of the police and debilitate their morale.¹⁷² Any modification of the rules relating to the detention and investigation of suspects should accommodate the needs and practices of the police with respect of their desire to interrogate suspected offenders in private.¹⁷³

Williams also argued that although the police were "remarkably successful" in obtaining incriminating statements by means of interrogation and while "this very success naturally awakens dark suspicions", it did not necessarily follow that unfair methods were employed.¹⁷⁴ After all:

When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover (and this is a fact too little understood by those who express alarm when confessions are made to the police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt.¹⁷⁵

The assumption that when interrogated by the police the factually guilty are so tortured by self-reproach that they welcome the solace of confessing to the offence in connection with which they are held, discounts the incidence of persons who, though innocent of the offence for which they are suspected, nevertheless, make false confessions of guilt. Williams was prepared, however, to acknowledge that *occasionally* "methods of debatable propriety" which resulted in false confessions were employed by the police.¹⁷⁶ Indeed, in adverting to the then recent, controversial and highly publicised case of Timothy Evans¹⁷⁷

¹⁷² Williams, G., 1960a, pp.328, 340; 1960b, pp.54-5.

¹⁷³ Williams, G., 1961, pp.54, 56, 57. See also Smith, 1960, p.349.

¹⁷⁴ Williams, G., 1960a, p.334.

¹⁷⁵ *Ibid.* According to Wigmore the custodial interrogation of individuals suspected of crime was justified because it ensured that "an innocent person is always helped by an early opportunity to tell his whole story.... However, and more important, [for the guilty suspect, the] nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and a deep sense of relief makes confession a satisfaction. As that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be law, to take his confession at that moment - the best one." (3 Wigmore, 1970, pp.524-5.) For similar comments see also Barry, 1966, pp.259-260.

¹⁷⁶ Williams, G., 1960a, pp.335-6. See also Hiemstra, 1963, pp.215-6.

¹⁷⁷ On the 30th of November, 1949, Timothy Evans, who was then 25 years of age, walked into a South Wales police station and told the duty constable that he had disposed of his wife's body down a drain outside his home at 10 Rillington Place, North London. The search of the drains revealed no sign of a body. On being informed of this Evans made a statement in which he alleged that his wife had died when his landlord, John Christie, had unsuccessfully tried to cause her to abort. On a subsequent search of the address the police found the bodies of his wife and baby daughter in a wash-house.

Brought to London, Evans - who had been detained in the custody of the Welsh police for 48 hours - on being interrogated and charged, confessed to the murders. He was subsequently remanded to Brixton Prison

- who had been convicted and in 1950 hanged for murder almost entirely on the basis of uncorroborated confessions (which he subsequently retracted) made in police custody - Williams suggested that there were certain individuals of such mentality and temperament who would in an effort to end the "atmosphere of suspicion and hostility ... say and sign anything that seems to produce for the moment a more favourable feeling."¹⁷⁸

In spite of his recognition of the dangers of false confessions from persons of a suggestible nature who under police interrogation might be improperly persuaded of their guilt,¹⁷⁹ Williams concluded that:

the danger of a false confession ... can hardly be regarded as a general reason for refusing to receive evidence of confessions given to the police.... The veracity of the confession would normally be a matter for consideration by the court of trial.... We do not normally exclude evidence from the consideration of a court merely because of the bare possibility that it is untrue. Important as it is not to convict the innocent, we cannot draw up rules of procedure and evidence *merely* for the purpose of acquitting the

where he made yet another confession. At his trial, which opened at the Old Bailey on the 11th of January, 1950, on the sole charge of the murder of his daughter, Evans' defence was that Christie, the chief prosecution witness, had committed the crime. The jury found Evans guilty; his appeal was rejected; he was hanged on the 9th of March, 1950.

Three years later Christie, who had subsequently confessed to killing seven women including Evans' wife - he denied killing Evans' daughter - was convicted and sentenced to death. He was hanged on the 15th of July, 1953.

The improbability of two murderers residing at the same address fuelled contentions that Evans had been the victim of a miscarriage of justice. Speculation that the prolonged interrogations of Evans breached the Judges' Rules; that the apparently full and voluntary confessions contained specific details of the murders because the police had, perhaps deliberately, conveyed them to him; that the police on being readily convinced of his guilt, failed to examine the available evidence adequately and indeed suppressed evidence that ran counter to their presumption of guilt, led to two official inquiries.

The first inquiry, conducted by Henderson QC, and held in camera, reported in 1953 (Cmd.8896). It concluded that the case against Evans was overwhelming. However, the demands for a further and public inquiry were met in 1965. Reporting in 1966, the Brabin Inquiry (Cmnd.3101) found it more probable than not that Evans had killed his wife (for which he was never tried) and had probably not killed his daughter.

The conclusions of Brabin, J, regarding Evans' confessions and recantation failed to appease public disquiet. Sixteen years after his execution, on the 18th of October, 1966, on the recommendation of the then Home Secretary, Roy Jenkins, Evans was granted a free pardon. For accounts of this notorious case and the issues to which it gave rise see Sargant, 1957, pp.194-202; Kennedy, 1961; Jackson, 1972, pp.112-3; Devlin, 1979, p.73; Woffinden, 1987, pp.17-50; Gudjonsson, 1992, pp.234-9.

¹⁷⁸ Williams, G., 1960a, p.336. Sargant (1957, p.181), however, in his influential behavioural study of the effects of combat and captivity had concluded that whenever "the right pressure is applied in the right way and for long enough, ordinary prisoners have little chance of staving off collapse.... *Ordinary people ... are the way they are simply because they are sensitive to and influenced by what is going on around them....* Even greater nervous tension, because it is more persistent, can be aroused in a prison cell or police station by skilled interrogation than in a fox-hole by enemy snipers or machine gunners" (emphasis supplied). See also Barry, 1966, p.257.

¹⁷⁹ Williams, G., 1960a, p.336.

innocent. Some slight risk of convicting the innocent in the rare and extraordinary cases must be accepted for the purpose of convicting the mass of those who are guilty.¹⁸⁰

This comment implies that from the crime control perspective, wrongful convictions - such as that of Timothy Evans, which are the product of uncorroborated incriminating statements secured under interrogation conducted in the seclusion of police custody and in breach of the Judges' Rules - are an unhappy but inevitable concomitant of efficient police methods which, if criminal conduct is to be repressed and if the criminal law is to be routinely enforced, must be stoically tolerated.¹⁸¹

Nonetheless, it was generally felt that the whole subject of arrest, detention, interrogation and investigation by the police should be reviewed and clarified.¹⁸² It was therefore suggested that this would be an appropriate subject for the *Royal Commission on the Police*,¹⁸³ set up in 1960. However, the operation of the Judges' Rules was withdrawn from its terms of reference when the Home Secretary, R. M. Butler, announced that as the judges had previously dealt with the matter, the right course would be to ask them to reconsider the taking of statements from suspects.¹⁸⁴

The Revised Judges' Rules

On January, 24, 1964 the reformulated Judges' Rules¹⁸⁵ were promulgated "in an atmosphere of crisis and haste worthy of most desperate emergency legislation."¹⁸⁶ As Gooderson points out "[t]his was not done ... through the medium of a judicial decision at

¹⁸⁰ *Ibid.* The Benthamite tone of Williams' contention that all confession statements secured by the police should be admissible to allow the courts to weigh all the relevant evidence, received wide support. See, for example, Hiemstra, 1963, p.211.

¹⁸¹ A view evidently endorsed by Barry, J (1966, p.257).

¹⁸² See Smith, 1959, p.679; Williams, G., 1960a, p.341; St. Johnson, 1966, p.57; Jackson, 1972, pp.103-5.

¹⁸³ The Commission (RCP) reported in May, 1962, Cmnd.1728.

¹⁸⁴ RCP, *Report*, 1962, para.5; Hoffman, 1964, p.24; Marshall, 1964, pp.97-8; Jackson, 1972, p.105.

¹⁸⁵ Published in the form of a Home Office Circular (No. 31/1964), the new rules came into operation on the 27th of January, 1964. The Rules and the accompanying Administrative Directions are reproduced in [1964] 1 WLR 152; 1 All ER 237; Cr.LR 165.

¹⁸⁶ Hoffman, 1964, p.23. See also Marshall, 1964, p.98; Editorial Comment [1964] *Crim.L.R.* 161, pp.161-2; (1964) 128 *Sol.J.* 101; A Police Officer, 1964, p.174; Smith, 1964, p.182.

all, but by an extra judicial announcement, made quietly and unobtrusively, without any express discussion or justification of the new policy, or even an indication that a new policy had evolved [so that] by and large it passed unnoticed that the position of the suspect *vis-à-vis* his interrogator ha[d] deteriorated markedly."¹⁸⁷ Indeed, as with their predecessor, the new Rules were a product of Home Office consultations with the judiciary of the Queen's Bench and were brought into force without first giving Parliament an opportunity to discuss them.¹⁸⁸

The legal status of the Rules was not altered by their revision. Deprived of the force of law, collectively they remained no more than "a guide to police officers conducting investigations", the breach of which rendering statements obtained "liable to be excluded from evidence in subsequent criminal proceedings."¹⁸⁹ The preamble to the Rules made clear, however, that like their predecessor, their observance was not a precondition to the evidential admission of confessions. The "fundamental condition" for the reception in evidence "of any answer given ... to a question put by a police officer and of any statement made", remained compliance with voluntariness test. The slightly amended voluntariness requirement, which was to be "overriding and applicable in all cases", provided for the exclusion of any statement obtained "by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."¹⁹⁰

Therefore, statements obtained in breach of the new Rules, as with the old, became inadmissible not because of that breach but only if the trial judge found the statement to be "involuntary"¹⁹¹ in the special sense of the term that evolved during the course of the nineteenth century.

¹⁸⁷ Gooderson, 1970, p.270. See also Thomas, 1964, p.386; Smith, 1964, pp.177, 180.

¹⁸⁸ Marshall, 1964, p.98.

¹⁸⁹ H.O. Circular 31/1964, Appendix A.

¹⁹⁰ *Ibid.* The addition of the words "or by oppression" to the voluntariness test propounded by Lord Sumner in *Ibrahim* [1914] AC 599, appears to have originated in dicta delivered by Parker, LCJ, in *Callis v. Gunn* [1964] 1 QB 495, p.501.

Operating to clarify rather than to extend the scope of the voluntariness test, the concept of oppression in the context of the new Judges' Rules was approved in *Priestly* (1965) 51 Cr.App.R. 1, *per* Sachs, J: "...the word 'oppression' ... imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary...." See also *Prager* [1972] 1 All ER 1114, p.1119; *Isequilla* [1975] 3 All ER 77, p.82b; *DPP v. Ping Lin* [1975] 3 All ER, 175, p.185e; *Hudson* (1981) 72 Cr.App.R. 163; *Rennie* [1982] 1 All ER 385.

¹⁹¹ Edmund Davis, LJ, in *Prager* [1972] 1 All ER 1114, rejected the contention that a breach of the rules was of itself a ground to reject confessions. He argued (at p. 1118j) that the acceptance of such a proposition "would exalt the Judges' Rules into rules of law.... Their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision whether, breach or no breach, it has been shown to have been made voluntarily." See also *Houghton* (1979) 69 Cr.App.R. 197.

Put alternatively, the correctness of police interrogations continued to be dependant upon whether an attempt was made to tender in evidence any allegedly voluntary confessions secured.¹⁹²

Although Commerton thought it "absurd" that wrongful practices by the police should be deemed so only when the courts excluded statements obtained by their use,¹⁹³ the preamble to the new Rules made clear that:

The Judges control the conduct of trials and the admission of evidence against persons on trial before them: they do not control or in any way initiate or supervise police activities or conduct.... The new Rules do not purport, any more than the old Rules, to envisage or deal with the many varieties of conduct which might render answers and statements involuntary and therefore inadmissible.¹⁹⁴

While some commentators expressed satisfaction with the new Rules, others argued that they left the dice "very much loaded in favour of the suspect."¹⁹⁵ One observer opined that the new Rules would "demand even higher standards of forbearance, introspection and foresight than the old." He also suggested that it would "be difficult to blame the police if they find these standards impossibly high."¹⁹⁶ However, in their explicit endorsement of custodial interrogations the new Rules constituted the official acceptance of the prevailing crime control practices developed by the police.¹⁹⁷

The old Rules required a police officer to caution the suspect, informing him that he was entitled to exercise his right to remain silent, as soon as the officer had "made up his mind to charge".¹⁹⁸ This enabled police officers to defend any period of delay in which questions

¹⁹² "... it was not contemplated that the rules would have any relevance to police interrogations which were not directed to obtaining statements meant to be put in evidence...." (Hoffman, 1964, p.26.)

¹⁹³ Commerton, 1964, p.194.

¹⁹⁴ This was underlined in *Sang* [1979] 2 All ER 1222, when Lord Diplock stated (at p.1230d) that "it is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them.... What a judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial."

¹⁹⁵ St. Johnson, 1964, p.92. See also Thomas, 1964, p.386.

¹⁹⁶ Marshall, 1964, p.102. See also *A Police Officer*, 1964, p.176.

¹⁹⁷ See, (1964) 108 *Sol.J.* 106, p.107; Abrahams, 1964b, p.107; Hoffman, 1964, p.26; Marshall, 1964, p.98; Thomas, 1964, p.383; Fellman, 1966, p.44.

¹⁹⁸ Rule 2.

were asked on the ground that they had yet to decide to charge.¹⁹⁹ The new Rules appear to have introduced an element of objectivity to the moment when the caution was to be issued. Under Rule II this was to be "as soon as a police officer has enough evidence which would afford reasonable grounds for suspecting that a person has committed an offence". At this point the officer was to caution that person "before putting to him any questions, or further questions, relating to that offence." Nevertheless, while the new Rules appeared to provide a more objective test upon which the courts could monitor the police use of the caution and seemed to require the caution to be administered at an earlier stage than the old Rules, it clearly gave the police considerable scope to determine the nature of their suspicions; the reasonableness of which being a subject the courts were unlikely to challenge.²⁰⁰

Rule III(a) required a second caution to be issued "where a person is charged with or informed that he may be prosecuted for an offence." In contrast, Rule 3 of the old Rules provided that "persons in custody should not be questioned without the usual caution being first administered." The meaning of "custody"²⁰¹ had been the subject of a good deal of confusion. It was also productive of "frequent and improbable denials by the police that they had put any questions at all."²⁰² Under the new Rule I, such denials became unnecessary for the police were authorised to continue questioning "whether or not the person in question ha[d] been taken into custody so long as he ha[d] not been charged with an offence or informed that he may be prosecuted for it."

That the new Rule I - deviating from the position that had been set forth in the old Rule 7²⁰³ and the circular of 1930²⁰⁴ - effectively sanctioned custodial interrogations is borne out by its suggestion of a period of time between arrest and charge which might be legitimately exploited by the police for the purpose of putting questions. However, only four years before the new Rules came into force Lord Devlin in an extra-judicial statement had emphatically asserted that:

¹⁹⁹ Compare Devlin, 1960, pp.29-30 and Hoffman, 1964, p.23.

²⁰⁰ See Hoffman, 1964, p.24; A Police Officer, 1964, p.175; Smith, 1964, pp.178-9.

²⁰¹ It was a provision which the Home Office Circular of 1930 "implausibly" (Hoffman, 1964, p.25) but authoritatively declared to mean that custodial interrogations were prohibited.

²⁰² Hoffman, 1964, p.25. Thomas (1964, p.383) goes so far as to suggest that the old Rule 3 was itself "responsible for the growth of the practice of 'inviting' suspected persons to attend a police station to answer questions."

²⁰³ Which provided for custodial questioning only for the purpose of clearing up ambiguities. See *Massey* [1964] Crim.LR 43.

²⁰⁴ Home Office Circular No.536053/23.

The police have no power to detain anyone unless they charge him with a specified crime and arrest him accordingly.... any form of physical restraint is an arrest.... The police have no power whatever to detain anyone on suspicion or for the purpose of questioning him. They cannot even compel anyone whom they do not arrest to come to the police station.²⁰⁵

Not only would Rule I seem to be inconsistent with this statement, it appears to be irreconcilable with the common law requirement that an arrested person be immediately informed of the reasons for his arrest. As Lord Simon in the leading case of *Christie v. Leachinsky*²⁰⁶ stated:

If a policeman arrests without a warrant on reasonable suspicion ... he must in ordinary circumstances inform the person arrested of the true ground of arrest.... a citizen is entitled to know on what charge or on suspicion of what crime he is seized.... The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.²⁰⁷

It would appear to follow, therefore, that a person arrested and informed of the reason for that arrest must also have been told (or might reasonably assume) that "he may be prosecuted". In such circumstances the questioning of the arrestee would seem to be wrongful. On the other hand, if the suspect had been detained without being informed of the grounds of his detention, the restraint upon his freedom, as Smith pointed out, would presumably be unlawful.²⁰⁸

²⁰⁵ Devlin, 1960, p.68. In this regard also see *Knight and Thayer* (1905) 20 Cox CC 711, and see the memorandum submitted by the Home Office to the 1928-9 Royal Commission, RCPMP, *Report*, para.148.

²⁰⁶ *Christie v. Leachinsky* [1947] AC 573.

²⁰⁷ *Ibid.*, pp.587-8. Also see para.(b) of the preamble to the 1964 Rules.

²⁰⁸ Smith, 1964, p.180. See also Zander, 1977, p.353.

Conclusion

The 1964 Judges' Rules, though silent in respect of the length of time permitted between arrest and charge,²⁰⁹ served to accord further legitimacy to the long established police practice of "detaining for questioning" - by means of arrest on suspicion, followed by a period of investigation by interrogation - to facilitate their construction of a sustainable case, before charge.²¹⁰ The revised Rules and the judicial decisions relating to them may, therefore, be seen as continuing a twentieth century trend under which the police were afforded greater latitude for pre-charge detention and interrogation. While they appeared to impose clear legal constraints upon the custodial questioning of suspects by the police, the Rules and the associated authorities actually worked to endorse and legitimate not only the police practice of detaining persons for interrogation but also the status of the police as chief accountants in the interrogation process. The extent to which the police control of both interrogations and accounts of interrogations allowed them to convey functional images of suspects, of the investigative process and of themselves will form the basis of the following chapters.

²⁰⁹ Rule II required the police to charge as soon as there was sufficient evidence.

²¹⁰ Hoffman, 1964, p.26; Thomas, 1964, pp.383-4.

PRE-PACE CUSTODIAL INTERROGATIONS: IMAGES OF DETAINEES

Introduction

The legitimization of police interrogations under the Judges' Rules and associated judicial rulings may be understood as a concomitant of the general acceptance of the police as the preeminent and consummate institution of law enforcement.

The modern professional police force had been established in nineteenth century Britain in the face of widespread opposition emanating from a variety of sectional and class interests.¹ However, as Reiner points out, by the middle of the present century "the police were accepted throughout British society, to the extent of becoming symbols of national pride."² Reiner gains support for his view of the 1950s marking "the high point of police legitimization in Britain", from the national opinion survey conducted on behalf of the Royal Commission on the Police in 1960. The survey documented "an overwhelming vote of confidence in the police".³

That the police institution was able to attain this level of apparent consent and legitimacy was a direct result of the organisational policies espoused by the nineteenth century "architects of the benign and dignified police image",⁴ Peel, Rowan and Mayne. Reiner identifies eight aspects to the organisational policies advanced by the founders of modern policing which played a crucial role in the movement to engineer consent for the police.⁵

Briefly, these policies comprised, firstly, the promotion of the image of police officers as full-time, disciplined members of a professional and bureaucratic organisation. The second major aspect in the formation and legitimization of the modern police lay in the adoption of the principle that it was incumbent upon officers having a duty to enforce the law to also

¹ Thompson, 1975, p.89; Davis, 1984, pp.315, 328-35; Reiner, 1985, pp.25-7, 39-42.

² Reiner, 1986, p.261. See also Bowden, 1978, p.37.

³ Royal Commission on the Police (RCP), 1962, Cmnd.1728, *Final Report*, at p.102. The survey found that 83 per cent of the sample had "great respect" for the police.

Reiner argues that his view is not impaired by the many methodological and sampling limitations of the 1960 survey (Reiner, 1986, p.261. The limitations are discussed in Whitaker, 1964, at pp.15-17. See also Brogden, 1982, pp.204-5) Reiner maintains that while the police "had achieved a pinnacle of popularity" by the 1950s, since then the "carefully constructed traditional image of benign and pacific policing" has gradually declined (Reiner, 1986, pp.258-9).

⁴ Reiner, 1986, p.262.

⁵ Reiner, 1986, pp.263-71; see also Reiner, 1985, pp.48-61.

obey and be governed by the "rule of law".⁶ Thirdly, public support was to be secured by cultivating an image of the police as a civilian force guided by self-restraint, having moral and legal authority to enforce the law without the force of arms. The fourth policy consideration advanced by the architects of modern police forces as conducing legitimacy was the development of the doctrine of "constabulary independence" as an aspect of the idea of the police being non-partisan servants of the public.⁷ The service role was also explicitly fostered by the pioneers of the "new police" in order to secure legitimacy for the institution. Further, preventive policing by uniformed officers was emphasised as a fundamental part of the legitimating policies. A seventh foundational element was, as Reiner puts it, "the successful appearance of effectiveness".⁸ Although, as Reiner acknowledges, it is difficult to assess precisely the crime control contribution made by the police in the period before the 1950s, despite periodic moral panics, the general perception of police effectiveness was favourable.⁹ The final aspect of the formative policies identified as contributing to ultimate acceptance and legitimation of a full-time and professional law enforcement agency was the incorporation of "the main structurally rooted source of opposition to the police", the working class.¹⁰

Reiner argues that together these distinct elements of the organisational strategy developed in the nineteenth century underpinned the gradual movement of the police towards increasing legitimacy. However, he asserts that this movement began to be undermined from the late 1950s when policing became exposed to increasing levels of public criticism and the politicised subject of a polarised law and order debate.¹¹ Largely, it is the inner-city riots and the industrial disputes of the 1980s that form the background for his central contention; that the constructed and accepted traditional image of the British

⁶ Miller, 1977, p.94; Bowden, 1978, p.21; Jefferson and Grimshaw, 1984, pp.157-161.

⁷ See Jefferson and Grimshaw, 1984, pp.14-15, 22-3, 42-51; Lustgarten, 1986, pp.32-3, 53-67, 164-75.

⁸ Reiner, 1986, p.269.

⁹ *Ibid.*, pp.259, 269; see also RCP, *Report*, 1962, Cmnd.1728, pp.101-4.

¹⁰ Reiner, 1986, p.269. Compare Brogden, 1982, pp.180-81.

¹¹ See Reiner, 1985, pp.49-51; 1986, pp.259-275. However, for evidence of widespread popular disquiet and lack of confidence in the police prior to the 1950s, see Howard, 1931, pp.228-236, who discusses "a series of disturbing episodes" involving police misconduct following the First World War which contributed to "the demand for a thoroughgoing investigation of police methods." There is also evidence to suggest that there was never a "golden age" of policing. From their inception the new police and their methods have periodically been the subject of strong criticism (see, for example, Storch, 1975; Cohen, P., 1979).

police as an honest and impartial body has recently suffered a process of de-legitimation that has caused the police to develop strategies designed to regain legitimacy.¹²

While the organisational policies expounded by the founders of the "new police", however poorly implemented in actuality, appear to have achieved widespread acceptance for the traditional images of policing up until the 1950s, it is clear that these images continue to influence the way the police institution is perceived and the way its members view themselves. Furthermore, although the more visible powers and operational practices of the police have in recent years become a highly politicised issue, less empirical attention has been paid specifically to the role which constructed images of policing played in respect of the procedure and the practice attending police interrogations during the period when they were regulated by the Judges' Rules and the overriding requirement that statements made by suspects when adduced as evidence at trial would be received only if they had been made voluntarily.¹³ This chapter will assess the extent to which specific and instrumental images of the police, police work and the policed may be discerned in this particular context and evaluate their potency and utility within the prosecution process that obtained prior to the changes introduced by the Police and Criminal Evidence Act, 1984 (PACE).

Clearly, in the context of police interrogations conducted prior to the introduction of the PACE reforms, an assessment of the degree to which the constructed images of policing corresponded with the reality of police practice - or indeed the extent to which the formal rules were complied with - is hindered by the private and essentially invisible nature of police custodial activities. The privacy in which the police were permitted to conduct interrogations is in itself a reflection of the acceptance of the police institution as valid in its mission and method. The authority the police enjoyed to exercise exclusive and total control over the conditions in which suspects were detained and questioned, and to exclude non-police actors from the interrogation process, shielded their activities from immediate external scrutiny. Critically, this also meant that the images of the police, their work, their competence, their interactions with suspects and the effectiveness of the

¹² Reiner, 1986, pp.271-73.

¹³ Judges' Rules [1964] 1 WLR 152, see introductory note and paragraph (e) of the Rules which made clear that the voluntariness of a statement existed as a "fundamental condition" to its admissibility. And, therefore, this would lead to the exclusion of those statements obtained from suspects "by fear of prejudice or hope of advantage, exercised or held out by a person in authority or by oppression." For the judicial interpretation of "oppression" as incorporated in the revised Rules of 1964, see *Callis v. Gunn* [1964] 1 QB 495; *Commissioners of Custom and Excise v. Harz* [1967] 1 All ER 177; *Priestley* (1965) 51 Cr.App.R. 1; *Prager* [1972] 1 WLR 260; *Isequila* (1974) 60 Cr.App.R. 52; *DPP v. Ping Lin* [1975] 3 All ER 175; *Hudson* (1980) 72 Cr.App.R. 163; *Gowan* [1982] Crim.L.R. 821. See also Devlin, 1960, p.38; MacDermott, 1968, p.10.

controls to which they were subject could only be obtained through their own constructed records of what had transpired in the police station. As committal papers, composed of statements and depositions prepared for the prosecution and conviction of defendants, these records provided external viewers, such as solicitors, magistrates, barristers, juries and judges, with a single and ostensibly reliable source of information of the investigative process and then only when a prosecution had been instituted.

Thus, the police, having unmediated access to suspects detained in custody, effectively dominated and controlled both the production and the presentation of the images - respecting themselves, their practices and those they interviewed - that formed a crucial element in the case assembled for prosecution.

On the basis of a sample consisting of 400 committal papers relating to cases heard in the Crown Court prior to the introduction of the PACE reforms, the present chapter will analyse and discuss a variety of images constructed by the police relating to the manner in which defendants as suspects detained and questioned by the police were portrayed in the police accounts. The constructed images of the police themselves and their activities will be considered in the following chapter. These images will be discussed during the course of the chapters with reference to the outwardly faithful police depictions of the investigative and interrogative processes of the pre-PACE adversarial system of criminal justice.

Some Preliminary Points

Before turning to the variety of constructed images identified in the survey of pre-PACE interrogation records, it becomes necessary to make clear that, as Table 1 demonstrates, in the overwhelming majority of the cases that comprise the pre-PACE sample the information upon which the prosecution, the defence and ultimately the courts were to assess the private custodial exchanges between the police and the accused was derived almost exclusively from unverifiable police accounts of those exchanges as presented in the written witness statements of individual officers:

Table 1: Mode of interview record, pre-PACE¹⁴

Mode of record	n	%
Police witness statements	394	98.5
Contemporaneous notes	4	1.0
Dictated by detainee	2	0.5
	400	100.0

Typically, these witness statements were prepared by the police long after the interrogations they purport to record had ended. Indeed, police accounts of what was said at interview were frequently found to have been prepared several months after the event.¹⁵ As McConville and Baldwin on the basis of their own pre-PACE study observed:

The police rarely take a verbatim record during an interview, and the final record is at best an attenuated version of what was said, coloured, and distorted by the frailties of human memory.¹⁶

Moreover, in constructing their *ex post facto* accounts of custodial interviews, individual officers, as result of the decision in *Bass*,¹⁷ were not prohibited from collaborating with each other in order to tender self-corroborating narratives to the courts.

Prior to this decision the courts, from early in the nineteenth century, had condemned this practice.¹⁸ However, when presented with evidence indicating that subsequent to a custodial interview conducted in breach of the Judges' Rules, two officers had made almost identical notes recording a confession alleged to have been voluntarily given by the accused, the Court of Appeal in *Bass* nevertheless concluded that:

¹⁴ For the equivalent figures from the PACE component of the present study see chapter 13, Table 3.

¹⁵ Devlin had argued that police officers made their notes "at the time" of the interview or "generally within at most an hour of [its] occurrence." (Devlin, 1960, p.41.) Williams, G. (1979, p.12) however, found that "judges habitually allow[ed] the police to use notes made appreciably after an interview".

¹⁶ McConville and Baldwin, 1981, p.162. See also Mirfield, 1985, pp.7-9.

¹⁷ (1953) 37 Cr.App.R. 51.

¹⁸ See *Swatkins* (1831) 4 Car. & P. 548. See also *Bass* (1953) 37 Cr.App.R. 51, p.60.

police officers nearly always deny that they have collaborated in the making of notes.... It seems to us that nothing could be more natural or proper when two persons have been present at an interview with a third person than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of superhuman memory.¹⁹

Thus, despite the judicially acknowledged dangers associated with incriminating admissions attributed to defendants which may have been fabricated by officers acting together, the Court of Appeal, presuming that police interrogators could be relied upon to record the totality of their exchanges with suspects, legitimised the previously proscribed practice of officers collaborating in making non-contemporaneous records of custodial interrogations.

A second point worthy of note is that the present study of police interrogations conducted in the pre-PACE era confirmed the findings of early empirical research conducted by Zander (1972) and by Baldwin and McConville (1979) with respect to the incidence of suspects detained in police custody who received legal advice. The findings of the present study are represented in Table 2:

Table 2: Adviser's attendance at interrogation, pre-PACE²⁰

<i>Adviser attends</i>	<i>n</i>	<i>%</i>
No	356	96.2
Yes (throughout interrogation)	10	2.7
Part of interrogation	4	1.1
Not known	30	-
	400	100.0

¹⁹ Bass (1953) 37 Cr.App.R. 51, p.59.

²⁰ For the number of cases in which detainees were interrogated in the presence of a legal adviser in the PACE aspect of the study, see chapter 13, Table 8.

The empirical evidence would seem, therefore, to point both to the dominance of police interests in their custodial interrogations with detainees and to the ineffectiveness of then governing principles contained in the Judges' Rules.²¹

Finally, it also needs to be stated that in order to preserve the relationship of confidentiality between client and legal representative, and to protect the anonymity of all persons concerned in the cases excerpted from the survey, it has been necessary to suppress or disguise those features which could conceivably expose the identity of any individual.

Images of Detainees

The images of defendants identified in the survey as frequently appearing in police interrogation records may conveniently be brought within four broad though not mutually exclusive categories. The categories comprise those cases in which defendants, while detained as suspects, are depicted as being: (1) defiant and or confident; (2) unequivocally guilty; (3) feckless or inept; or (4) artful. These categories or typologies will provide ample scope for a discussion of the utility of such images, the degree of control enjoyed by the police during the pre-PACE era in their construction and their consequences in the wider criminal justice process.

The categories may be seen on the one hand as of descriptive value, providing a means for mapping out the various kinds of suspects and defendants who are brought within the criminal process and provide the police with the raw material to enable them to pursue their law enforcement function. On the other hand, they may be seen as a vehicles affording information about the police and their work in the private sphere; their values and ideologies; and their capacity to present defendants in particular ways to powerful others in the criminal process. The categories also serve to highlight the issue of the relationship between the images conveyed in the police accounts and the realities which they purport to describe. This issue can be partly addressed in terms of a critical assessment of the plausibility of the images themselves, but is more thoroughly explored when the accounts or constructions are compared with the recorded realities of the PACE era.²²

²¹ See Home Offices Circular No.31/1964, principle (c); see also the accompanying Administrative Directions, para.7. Also see *Lemsatef* [1977] 2 All ER 835, pp.838-9; the Criminal Law Act, 1977, s.62; Zander, 1972, pp.346-8; Baldwin and McConville, 1979, pp.145-52; Softley, 1980, pp.68-9.

²² See Chapter 13.

1. *Defiant and or Confident Detainees*

The defiant and or confident defendant who, as a suspect detained and interrogated by the police, was often shown to be self-assured, familiar with the mechanics of the criminal process and therefore unperturbed by being drawn into it. This image carries with it the implicit message that the detainee is factually guilty but is aware that this is quite distinct from being found legally guilty by a court of law. Frequently, irrespective of the attitude of the detainee, the impression conveyed is that he or she was in some way responsible for the offence for which they were being questioned. This impression stems both from the specific and instrumental ways in which the detainees are portrayed and from the confidence displayed by the police in their apparently well-founded and reasonable suspicions.

In **Case AP1051**, D, while driving, had been stopped by two officers who identified themselves and explained that they suspected that stolen property was in the vehicle. D denied this. However, upon examining the car the officers seized certain items of property. D was arrested and taken into custody. During the formal custodial interview D claimed that he had purchased the property found in the car.

- PO: You mean to tell me you bought these from a man in a pub? Let me tell you now, I don't believe you.
- D : Please yourself. That's what I'm saying, now it's up to you to prove something different.
- PO: If that's your attitude, you will be detained here whilst we make enquiries....
- D : Please yourself....

At this point the interview was broken off. When it resumed D was asked who had stolen the property if he had not. To this he is reported to have replied:

- D : You've got to prove they're stolen, that's your job....
- PO: ... you are at least guilty of handling them.
- D : So get on and charge me....

Later, in spite of his initial combative and defiant attitude, D reportedly confessed. However, when asked to name his accomplices he is reported to have become uncooperative.

- PO: I doubt if the break was committed by you alone. Who else was with you?
- D : Don't be stupid ... don't think I'd go that low.

Asked if he would like to make a statement D replied:

- D : Be serious, nothing goes down on paper from me.²³
- PO: You will be charged with burglary....
- D : You do your job and leave me to worry about that.

This short extract is sufficient to enable the reader to assess the character of D, if not the case against him. The defiant attitude struck by D gives the impression that his initial claim to innocence, which he made no attempt to substantiate through evidence, was untrue. Although he was under no legal obligation to substantiate his story, he appears to exploit this by reminding the police that it is for them to establish that his story is not true. He therefore appears as a factually guilty person who seeks to "brave it out" by defying the police to prove their case. The police for their part are thus "justified" in detaining him in order to conduct further inquiries. Finally, although D appears to have eventually confessed to his part in the burglary, his unwillingness to implicate his accomplices indicates a concern to place an allegiance to his criminal associates above his moral duty to assist the police. Clearly, the unfavourable images of D to emerge from the police narrative account of his arrest and interrogation, present the court with a portrait of his character and culpability, conducive to the prospect of conviction.

D in **Case BP1097** was arrested, detained and formally questioned on suspicion of being responsible for the burglary of a private house from which £15 was stolen.

- PO: [The complainant] says that she was in the toilet when you called. When you knocked on the door she asked you to wait. When she left the toilet she heard the sound of the rustle of paper and when she got into the room, you were standing inside.... When you had gone ... she looked in her handbag ... and she found there was £15 cash missing.
- D : That's not true. I didn't go into the room until after she had left the toilet and I didn't touch anything in the flat.
- PO: Are you saying that this lady is telling lies?²⁴

²³ This comment would seem to confirm the non-existence of contemporaneously made police interrogation records in the pre-PACE era.

²⁴ In the course of the present and following chapters it will be seen that this form of "question" is commonly employed by the police. With it the questioner attempts to "interpret" the detainee's words, denials or posture so as to provide an incriminating account. Clearly, such questioning is inconsistent with

- D : Well look at her, she's old, she don't know what she's doing, she might have lost the money.
- PO: Well the money was in her purse before you came into the room and it was gone after you left.... I think you stole the money while she was in the toilet.²⁵
- D : You can't prove anything. I shall say I was never alone in the room and you try and prove different. That old lady will never get to court anyway.

In this case D is depicted in a similar manner to that of his counterpart in the previous case. Again, irrespective of the nature of any alternative forms of evidence that might connect D to the offence, the reader is left with an impression that the accused is guilty. He is shown to have shifted his position from initially denying the offence, to one in which he appears to have formulated a strategic plan to challenge the police to attempt to prove their case in court. Moreover, he appears confident that the complainant would be either too infirm or perhaps unwilling to appear as a witness. The reader is invited to conclude that this confidence - seemingly based upon a cynical assessment of the capacity of the police to prove their case - is misplaced.

Other examples of defiant but ignorant suspects appearing to revel in the misguided belief that the evidential burden facing the prosecution was such as to preclude conviction are found in **Case AP1197** and in **Case BP1015**. In the first of these examples the police had received a report of an attempted burglary. However, on arrival they found the perpetrators had left. Later that evening D was identified by a civilian witness as being one of the persons involved. D was arrested and detained in police custody where he was interviewed. Throughout the interview D reportedly maintained his innocence, when, at the close of the interview, the following exchange took place:

- PO: You were seen by a witness and identified ... as being one of four men concerned in stealing some copper cylinders from [the commercial premises].
- D : I haven't been anywhere. I was just walking along the road [when I was arrested].
- PO: You were in fact seen loading the copper into a van there. Whose is it?
- D : I don't know, its not mine.
- PO: I should like to know the identity of the other three men. Who are they?
- D : You've got the van, you can find out who owns it can't you? I'm not putting anybody else in.

the conventional image of the police as neutral or passive actors who simply receive voluntarily given answers to questions.

²⁵ This style of "question" - also frequently employed during police interrogations - may be contrasted with that referred to in note 24. Here the police explicitly state their case theory in order to elicit an incriminatory response from D.

- PO: Are you now admitting that you were involved?²⁶
 D : I'm admitting fuck all, you prove it.

Here, while D is reported to have defiantly refused to admit guilt, he is shown to have inadvertently betrayed himself.

In **Case BP1015** the suspect had been approached by two officers, who informed him that he was being arrested "in connection with burglaries at houses in [Wingsdale] and [Shipshire]. You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." The suspect replied:

- D : I'm saying nothing.

He was conveyed to the police station where he is reported to have asked:

- D : What's this all about?
 PO: You have been arrested following certain information received; we have reason to believe you are involved with [a named accomplice] committing burglaries last year.
 D : You are going to have to prove it chum, I'm saying nothing.

Although D was apparently cautioned that he was not obliged to respond to the allegation, his exercise of that "right" has the effect of implicitly confirming the suspicions of the police and of encouraging the reader to conclude that D is in some way involved. In this case the suspicions and the encouragement receives further credibility from the police witness statements which report that D was detained while his rooms were searched. There, it is reported, incriminating real evidence was recovered.

In **Case PP1090** the suspect, a car dealer, was arrested and questioned in connection with the theft of a number of motor cars. The police had also questioned his alleged accomplice (Z). Initially D had maintained that he was innocent. Then, apparently with the realisation that the police had acquired evidence of his involvement, he appears to have adopted a relatively compliant attitude. However, he continued to resist the full force of the allegations communicated by the interviewer. The crucial exchange between D and the questioner is recorded as follows:

- PO: What about the accident you had ... in one of the cars?
 D : Who told you that?

²⁶ See note 24.

- PO: [Z] told me. Besides that car the others have been recovered in a damaged condition. Are you trying to tell me that damaged cars sell readily on the market, which would be the case if you believe [Z] and his brother are dealers?²⁷
- D : I'm not trying to tell you anything.
- PO: You are trying to tell me that you didn't know these cars were stolen. You are trying to tell me that you thought [Z] and his brother were car dealers and although these cars were treated with no respect whatsoever, they could still be sold to members of the public. Is that correct?
- D : That's my story and I'm going to stick to it.... I know it doesn't look too good for me but I'm not going to admit to stealing those cars....
- PO: I have seen [Z] and as I have already told you, he's putting all the blame on you and you're saying its him. Isn't it a fact that you are both telling lies and you are all involved together?
- D : Look, I admit to driving them, but as far as stealing them goes it will be my word against [his] and that's it.

In this exchange D is presented as being obdurate in manner. Despite the apparently considerable evidence in the possession of the police connecting D to the offence he resolves to stick to his story. While his story may be consistent with his innocence the implication remains that this story is a fabrication and that he would be prepared to accept a lesser charge. The officer, for his part, is depicted as a concerned guardian of the public interest who has based his questions on his own thorough investigations; investigations that indisputably point to the guilt of the defendant.

The following case is perhaps a stronger example of the record of the police interview serving to convey a particular and partial view of the character of the suspect rather than as a means of relating to the reader his voluntary responses to questions put in the course of police investigations into an alleged offence. Here the dialogue appears to be primarily concerned to show that D is an unsavoury character who impudently articulates the continuing threat law enforcement officers face as they go about their duties. The suspect in **Case AP1163** was arrested on suspicion of being involved in a fight between two gangs in which an officer, who had attempted to make arrests, sustained injuries. During his formal custodial interview he was told:

- PO: You have been arrested on suspicion of being involved in the attack on PC [W]....
- D : He got what you all get one day when we blood you up.
- PO: Are you saying that it is alright to go about knocking policemen about?²⁸

²⁷ See note 24.

²⁸ See note 24.

- D : If you harass my brothers and me then the war will start. All you Babylon will burn.
- PO: I am not very impressed by this. I want to know what happened last night.

Analysis of the interrogation records showed that the image of the menacing, hostile, combative and sometimes violent suspect was commonly, though not exclusively, associated with young Afro-Caribbean males.²⁹ Such individuals were generally portrayed in stereotypical terms and depicted, through means of supposedly objective police accounts of social reality, as using a form of pidgin English (patois) ascribable to a particular and villainous section of the black community.³⁰

A further example of this theme is found in **Case PP1014**. The black suspect, one of "a large contingent West Indians"³¹ who, it was alleged, had attempted to prevent the police from making an arrest, is reported to have become so violent that it became necessary to place him "immediately" in the police cells. Later, at the commencement of his formal interview, D was cautioned. His response, according to the police transcription of his use of patios, was to ask:

- D : What you talk. Why you dread arrest me?
- PO: You were arrested because you assaulted me while I was making a lawful arrest.
- D : Fuck sake, dread man, me no want to talk to you. You Babylon, you burn.
- PO: It's up to you whether you want to talk about it. Do you want to make a statement about this?
- D : Go away, leave me.
- PO: Very well, you will be charged with assaulting [me].
- D : Well you just go right ahead and charge me. It make no difference to me.

D was then formally charged. It is reported that when he refused to sign the charge sheet he turned to the officer he had allegedly assaulted and said:

- D : I will get you blood man, and I wreck this station.

²⁹ See also Cain, 1973, pp.117-19.

³⁰ For a discussion of pre-PACE police attitudes to blacks, particularly young blacks, and the derogatory terms used by the police to describe them, see Holdaway, 1983, pp.66-71. See also Cain, 1973, p.117; Smith and Gray, 1983, p.334.

³¹ It was found that black suspects were invariably referred to as "West Indian" or "Jamaican" in the pre-PACE witness statements of police officers.

He was then placed in the police cells. The contrast between the fractious suspect and the courteous officer would be all too apparent to the reader, be that the prosecution, the defence, or the adjudicator.

The report of the dialogue between the black suspect and the interviewing officer in **Case AP1122** exhibits many of the stereotypes associated with self-assured, confident and practiced recidivists; the so called professional criminal. The formal custodial interrogation of D in this case followed an incident in which a number of "West Indian" youths allegedly inveigled a cashier into opening her till and then made off in a car with a large amount of the cash therein. D had expressed a willingness to admit to being present but he continually refused to implicate others.

- PO: You admit being involved in the robbery then. Would you care to tell us who was with you?
- D: No way man, me you've got but you're going to have to work for the others. Just don't ask me.
- PO: Well, how about the car, whose it that, yours?
- D: I don't drive. I just went along for the fun. I made thirty sheets and now I got caught. Don't try and trick me for the other names.
- PO: In view of what you have told us I am now telling you that you will shortly be charged with being involved in the robbery. Do you want to make a statement about what you have already said?
- D: I'm saying nothing until I've seen our friend Mr [Q].
- PO: Who is this Mr [Q]?
- D: You got to know him man, he's our whitey solicitor. He always looks after me and my friends.
- PO: In that case you had better speak to him first. Do you want to call him now?
- D: No he'll be there to see me in the morning. My friends will tell him where I am.

At no point during the interrogation as reported by the police did D explicitly confess in answer to any direct question on his involvement in the offence. Rather, the damaging admission ascribed to him was apparently volunteered in response to a question seeking information about the ownership of the alleged getaway car. The possibility of this scenario being challenged is limited, firstly, by the position accorded to police witnesses *vis à vis* defendants in the "hierarchy of credibility".³² The other important basis which renders this police account relatively immune from challenge is the depiction of D as being arrogantly confident in the abilities of his solicitor. His somewhat indelicate (if not obtuse) references to his solicitor encourages the reader to take an unfavourable view of him and of the credibility of his adviser.

³² Sanders, 1987, p.238. See also Devlin, 1960, pp.46-8.

Case AP1217 is a final and to some extent a most alarming example of the characteristically truculent and defiant Afro-Caribbean male. In this example, D is seen to personify the general contemptuous attitude of black offenders toward white institutions of authority. However, by virtue of his seemingly unguarded or absent-minded admission, he emerges as an essentially dull-witted exponent of this attitude.

Arrested at his home on suspicion of being a member of a group responsible for committing a number of burglaries, D was taken into custody and formally questioned:

- PO: What do you know about the tape recorder [recovered from your address]?
- D : I hate you white rasses. Don't ask me to write anything.
- PO: I'm not asking you to write anything, just tell us what you know.
- D : You already know, we got it from the house. Why should I help you?
- PO: What about all the other gear there? You might as well tell us the truth because you are going to the court anyway.
- D : You tell the white pig judge what you like man, find the houses yourself. Now go away and leave me alone.

The dismissive attitude exhibited by D in this narrative account raises the clear inference that he is a burglar who has secreted the goods in question. It is not clear whether the property was recovered prior to trial, however, this exchange would also serve to vindicate any inability of the police to trace the goods.

Suspects interrogated by the police who exhibit contempt for the criminal justice process and display signs of a sociopathic disposition are, of course, not confined to any one single ethnic group. In **Case PP1029**, for example, officers arrived at a public house in which a violent altercation had occurred. They approached D who "had blood all over both hands [and] blood on the trousers he was wearing". D was asked what he knew about the injuries sustained by the party to the fight who required hospital treatment. It is reported that he was cautioned before he replied:

- D : A fucking Cockney, like the Paddies and Coons, I'll fix the lot of them.
- PO: What did you do to him?
- D : I bashed him with a glass. I'd do it to all the bastards. The Brums are alright but I can't stomach Cockneys, Paddies or Coons.

On being taken into police custody the suspect is reported to have added:

D : You punks are all the same, you won't do anything about the Irish blowing us up, but you'll lift me for doing the job for you. My arms aren't tied.

Part of the formal custodial interview is reported as follows:

PO: I have come to see you regarding the fight you were in at [the public house] tonight.

D : I know nothing about it, I ain't been in any fight.

PO: How do you account for the blood all over your coat?

D : Its from cuts on me.

PO: But you haven't got any cuts so let's have the truth.

D : Who was it, that Cockney bastard and his black cunt who put me in, you won't prove it as no one will stand up in court against me.

PO: Do you want to make a statement? If you do I will take it down or you can write it yourself.

D : I'm saying fuck all to you, he won't make it to court. I've taken note of you son.

Clearly, irrespective of the merits of his case, D is shown to have little, in terms of his personality or therefore his credit-worthiness, that might endear him to the courts.

The following excerpt from **Case AP1048** illustrates that images of suspects (and of the police) conveyed in the police record are not only constructed in the context of the formal interrogation. As with narrative account of interrogations, police witness statements also provide a means to reinforce images constructed to further the case against the accused. In this instance the formal interrogation may be seen as serving to amplify those features that had been adumbrated at the arrest.

The three officers concerned in this case record in their respective and corroborating witness statements that whilst on duty in their stationary and unmarked police vehicle, the senior officer observed two men (brothers) in a parked car. The officer became "suspicious of their actions and demeanour". He therefore caused the police vehicle to stop in front of the parked car. The officer then began to approach the parked car which nevertheless began travelling towards the officer, despite his giving "the authorised police signal for [the driver] to stop". The driver who "made no attempt to slow down" was seen to "crouch down over the steering wheel and look directly at [the officer]". The officer reports that the driver "aimed the car" at him. Realising that the driver "intended to run [him] down" the officer jumped out of the way. This action caused the officer to suffer "severe bruising". Returning to the police vehicle the officer chased the car which was being driven in a manner that was "extremely dangerous to other road users". Eventually, the car was forced to stop after the driver of the police vehicle found he was "unable to avoid a collision with the car".

The passenger of the car was seen to throw a punch at the officer who apprehended him. He then proceeded to "attack [the senior officer] viciously". During the "violent struggle" that ensued the officer "was forced to use exceptional force" in order "to subdue [his] assailant". At the conclusion of the "long and violent struggle" the passenger of the car "became unconscious" and was taken to hospital.

Meanwhile, the driver of the car was "being held on the floor" by another officer. The senior officer said to the driver, "I am satisfied that you have been drinking and as you have been involved in an accident I am going to require you to take a breath test. Will you give me a sample of breath?" To which the driver is reported to have replied: "Balls. Get fucked". The driver was arrested. However, he "became violent and had to be forcibly restrained" from the moment of his arrest and during the journey to the police station where he was placed in a cell.

After the driver had "quietened down" and was "attentive" the arresting officer (AO) and the office sergeant (OS) visited the driver in the police cells:

- AO: I have arrested this man for failing to take a breath test. He has been involved in an accident and also he attempted to run me down.
- D : Yes cunt, but only once and I missed.
- OS: You heard what this officer has said.... Will you provide me with a specimen of your breath.
- D : Fuck off.

The office sergeant made three further requests for a specimen. These requests were met with remarks such as "Bollocks" and "Get stuffed". The interview was abandoned, the officers left the cell. Later, apparently at the request of the detainee, the arresting officer and the office sergeant again went to the cell:

- AO: I believe you want to see me.
- D : Yes. I am [giving his full name] and the one who knocked [stole] the motor is my brother. He only came out last week from time for motors. I want to go home, he can get fucked. I have a wife and two kids at [giving his address]. Check and let me out.
- AO: Where does your brother live?
- D : With me.
- AO: Will you make a written statement regarding tonight's events?
- D : What size cunt do you take me for?

D was then charged and returned to the police cells. The reader is left to conclude that the dramatic fluctuations in the positions adopted by D, from violently uncooperative and

abusive, to an accommodating and responsible husband and father, was due partially to his inebriation and partially to his being left to contemplate on the gravity of his offence in his cell.³³ Ultimately, however, the narrative account defines the suspect as a criminal, one that is hostile to the police, and one who in a weak moment betrays his brother but one who will not corroborate it officially.

In respect of the passenger of the car, the brother of the driver (DB), after receiving treatment in hospital he was also detained in a police cell.

- AO: You have been arrested for assaulting me and also allowing yourself to be carried in a stolen motor car. [The police account of the interview records that the caution was then administered.]
- DB: Fuck off.
- OS: You will be kept in custody until we get your details. I believe you are related to the driver of the car. Is that correct?
- DB: Fuck off.
- AO: The car was stolen. I believe you stole it although you were not the driver tonight. Is that right?
- DB: He [his brother, the driver] will get his fucking face hammered. Now fuck off before I give you a fucking hiding.

It is reported that DB "refused to answer any further questions" and he was left in the police cells until he was later charged. The excerpt, however, suffices as an illustration of the marked disjuncture between suspect persons and police interviewers which was found to characterise the majority of pre-PACE interrogation records.

2. *Unequivocally Guilty Detainees*

The unequivocally guilty detainee also appears with considerable frequency in the police interrogation records of the pre-PACE era. These detainees appear in police narratives as suspects having little or no desire to resist a compulsion to make full or partial confessions or to cooperate with the police.

The basic images conveyed of this class of suspect include those who seem intent on seeking the solace derived from "making a clean breast of it".³⁴ They appear to seek the cathartic effect said to follow an early avowal of guilt or, in some cases, seem to believe

³³ The image of a class of suspects who come to realise the futility of opposing the reasonable suspicions of the police will be discussed below.

³⁴ See Devlin, 1960, p.50.

that an early confession might benefit them both in the eyes of the prosecution and those of the court.³⁵ They are, therefore, often presented as making damaging admissions either from a deep sense of remorse or as a result of introspective deliberations upon their own best interests. This class of suspect, might admit to their part in an offence at the first available opportunity or only when they are brought to realise under interrogation that the evidence against them is overwhelming. It is not uncommon for suspects in this model to offer a motive for their actions. Occasionally, however, they will be shown to be unwilling to incriminate others or alternatively to accept *full* responsibility themselves.

The police record of **Case PP1020** relates that the suspects, D1 and D2, had been arrested by officers of the Kingshire Police Force (KPO) for offences arising out of an alleged assault on an officer who attempted to arrest them on suspicion of driving a stolen car. Under interrogation by the Kingshire officers, D1 and D2 are shown to be compliant confessors.

KPO: You were arrested for taking a motor vehicle from [Cuddlestone] earlier tonight. What have you got to say about it?

D1 : Yes alright we nicked it from near the Church.

KPO: You were the driver of the vehicle?

D1 : Yes.

At this point D1 was shown two passports, neither of which were in his name.

KPO: Where did you get these from?

D1 : They're a couple of mates I know.

KPO: Did they give you these documents then?

D1 : No.

KPO: How did you come by them then?

D1 : Went to the Registrars in [Boldham] and got copies of the birth certificates and used them to get the passports, then we could get to France.

KPO: So you pretended you were [the persons to whom the passports were issued] and forged their signatures on all the necessary documents?

D1 : Yes.

³⁵ See *Rennie* (1982) All ER 385, p.388, *per* Lord Lane: "Very few confessions are inspired solely by remorse. Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence."

D1 was then questioned in respect of a number of items including a bank book also made out in the name of another person. He answered each question in turn, explaining that each of the items were taken as a result of thefts from private cars or homes.

D2 was questioned separately by the same officer.

KPO: You have been arrested for taking a car from [Cuddlestone] earlier tonight. I have spoken to [D1] and he has told me a lot. Now, what have you got to say?

D2 : All right I may as well put my hands up.

D2 proceeded to volunteer a full confession, corroborating the confession of D1. On the surface, the question put to D2 appears as an invitation to volunteer his own explanation. However, a close examination of the question reveals its true import. The question conveys specific messages to the accused. It communicates to D2 that D1 has confessed and therefore has in all likelihood implicated him. It also implies that D2 can not realistically deny the offence. Although D2, in common with other detainees, has a conditional right to elect to reserve any explanation he might have, the question demands and in this instance secures an immediate (and the expected) response.

According to the witness statements of two Boldham Police officers (BPO), on the following day they travelled to Kingshire and there arrested D1 and D2 on suspicion of being involved in a number of burglaries in the Boldham area. During the journey from Kingshire to Boldham, the following exchange is reported to have occurred.

BPO: I understand you admit offences in [Northsham] and [Bridgeford] as well as [Cuddlestone], is that right?

D1 : Yes, I reckon we've got about a dozen to answer to.

BPO: Have you told us everything you've done?

D1 : It's difficult to remember....

BPO: Well have a think and if there is, tell me if you want to when we get to [Boldham police station].

It is reported in the police narrative that after D1 was charged and then placed in the police cells at the Boldham station he volunteered further information regarding other burglaries to the officers who visited him there.

Doubt has been cast upon the reliability and fidelity of police witness statements of the pre-PACE era, not least because of the difficulty they posed for those defendants who alleged that the statements ascribed to them were not in fact made. Quite apart from the widely acknowledged suggestions that the police routinely fabricated damaging statements

said to have been made by defendants, a practice also known as "verballing",³⁶ it is clear that the witness statements of police officers also afforded them opportunities to exclude or to omit certain verbal exchanges from the official record of what had transpired between themselves and suspects. By the very nature of the police record it is not possible to determine with any confidence the extent to which the practice of fabricating or of omitting to record statements took place. However, the present case highlights the dangers inherent in the reliance the criminal justice process of the pre-PACE era placed upon unverifiable accounts of custodial interrogations prepared exclusively by the police.

It will be have been seen that in **case PP1020** the context in which the conversation between the police and D1 as they travelled from Kingshire to Boldham is not reported, presumably because it was considered to be immaterial. While there is no direct evidence to suggest impropriety on the part of the police, it is clear from this and many other similar cases that the potential existed.

According to the official record of the custodial interrogation of the detainee in **Case AP1066** the following custodial dialogue was recorded:

- PO: Now look [Martin], on the night of 31 January and 1 February this year the service station [at a named address] was broken into and a calculator was stolen. I know you did it.
- D : How did you know it was me?
- PO: That's immaterial, did you commit this offence?
- D : Yes I did. I'm sorry.

There is no evidence in the prosecution papers associated with this case to indicate that the officer had prior knowledge of who was responsible for the burglary. Conceivably, the claim was made in order to induce a confession. It is also possible, however, that the source of the apparent certitude exhibited by the officer was an informer the identity of whom could not be revealed. Nevertheless, by interrogating D, any confession made by him (or attributed to him) would not only facilitate his conviction it would also serve to confirm police suspicions and vindicate the decision to detain, question and prosecute him. Furthermore, as the following extract from the same case illustrates, there remains the possibility that a detainee, when subjected to interrogatories, will surrender additional information which will enable the police to "clear-up" other outstanding or offences.

³⁶ See Royal Commission on the Police, *Final Report*, 1962, Cmnd.1728, para.369; McConville and Baldwin, 1981, pp.163-70, 193.

- PO: There was another break just up the road about the same time ... the place was completely wrecked. Do you know anything about that?
- D : Yes, I was low that week. I'm fed up of being on the dole.

The following interview record, excerpted from **Case PP1013**, depicts the suspect as becoming a willing and extremely cooperative confessor after his initial strategies of evasiveness and of feigning ignorance had failed. The general impression to be gained, therefore, is that the suspect, though ultimately compliant, is calculating, deceitful and underhand; this impression is reinforced by his use of criminal argot. The police, for their part, are seen to be well-informed, undeviating in the pursuit of "the truth" and at all times concerned to ensure that any admissions made were voluntarily given.

LRK was suspected of being involved in the illegal sale of a car with a stolen MOT certificate. The police found the suspect to be asleep in a friend's house.

- PO : We are Regional Crime Squad and you are [LRK].
- LRK: [L] who? What are you on about?
- PO : You are [LRK] also known as [P] and [H]. You can use what name you like, but I'm going to call you [K]. Get up and get dressed, you are under arrest.
- LRK: I don't know what you are on about.
- PO : Do you know [WT]? He's been arrested for receiving stolen MOT's and I have good reason to believe you're involved.
- LRK: Alright, fair enough. Gotta try ain't ya?

The officer then referred to a quantity of cigarettes, alcohol and cash that had been found on the premises and asked, "what's all this then?"

- LRK: Its for a party.
- PO : That's come from a pub break.
- LRK: Alright, who's put me in, surely not [W]?
- PO : Which pub have you done?
- LRK: I don't know a friend called and left it for me.
- PO : Its obvious you've done the break.
- LRK: I'll admit receiving.
- PO : You didn't receive them.
- LRK: He must have used my coat.
- PO : Who's that then?
- LRK: A friend.

PO : What's his name?

LRK: No way. Look you've got me fair and square. I'll clear my sheet when we get up the nick but you won't get any names.

The next case, **Case PP1022**, involves an apparently voluntary confessor, one who, the reader may infer, is responsible for a number of unsolved offences. The implication being that he is an experienced, though essentially petty and opportunistic, offender.

The witness statements of the officers concerned record that they went to D's address where one of the officers addressed him thus:

PO: We are Detective Officers from the Serious Crime Squad. We are making enquiries into an offence of burglary at a chemist's shop in [Lakewalk Green] and I have good reason to believe that you can assist me with my enquiries.

It is reported that D was cautioned before he replied:

D : I don't like the sound of this. Has somebody fingered [implicated] me?

D was then taken into custody and formally questioned when he made a full confession not only to the burglary for which he was arrested but also to other burglaries. The formal custodial questioning is recorded thus:

PO: We have told you the nature of our enquiries and why you have been arrested. Is there anything you wish to say about the matter?

D : How much do you know? Have you got any evidence?

PO: We are making enquiries about an offence of burglary at a chemist's shop.... From the enquiries we have made, I think that you were responsible.

D : Was it a climbing job?

PO: Well it was an upstairs window. Are you admitting being responsible for this offence, because I want to remind you that you are still under caution before you say anything else?

D : Okay, it's down to me, I knew there was a set of ladders nearby. I used the ladders to get to the upstairs' window and broke in. I don't know why I bothered there was no bloody stuff there.

PO: Well didn't you steal anything at all after you broke in?

D : I can't remember now, I don't think I got anything.

PO: We have information that you were trying to sell a camera recently and that the camera was stolen. Did you get the camera from there?

D : Yes, it must have been from there that's the only place I've broken into.

- PO: Now it is entirely a matter for yourself, remember you are still under caution. Do you wish to make a written statement about this matter? If you do, you can write it yourself or if you wish, one of us can write it for you.
- D : You write it, Jock, I've told you all about it anyway.

After D had dictated his confession to the officer he is reported to have said:

- D : Look Jock, I've been thinking, I can't remember whether I had the camera from there or not.
- PO: Well there is a camera reported stolen from this offence. Do you mean you have committed some other offences as well? Remember even though I have taken this statement from you, you are still under caution.
- D : I know about that, but you're going to find out about this other offence anyhow. I suppose you might even find my prints there now that you've locked me up.
- PO: Where was this other offence?
- D : It was another chemists' shop [giving the address]. I was drunk one night and I smashed the glass in the front door. That's what's confusing me. I can't remember which one of the chemists' shops I got the camera from.
- PO: Do you wish to make a further written statement about this matter you have just told me about?
- D : No, leave it as it stands. I've done the two of them but I was drunk when I did them both. That's why I can't remember which one the camera came from. Does this mean I'll have two charges now?
- PO: Well at the present moment, you will be charged [with respect to the first offence]. The papers we have suggest that the camera was stolen from there but I will make further enquiries and it may well be that the charge will be amended at a later date.
- D : That's fair enough then, I won't mess you around. If I knew which one the camera was from I would tell you. It's easy to get mixed up when you've been drinking.

Particularly, though not exclusively, with regard to those cases identified by the survey as falling within the "unequivocally guilty" class, police records of their custodial interactions with detainees are frequently presented in a manner that might suggest that a full trial into every aspect of each case is unwarranted or unnecessary. In other words, although confessions are not always necessary to sustain convictions,³⁷ the nature of apparently uncoerced and voluntary confessions, as detailed in police accounts, clearly militate against any adversarial confrontation between the prosecution and defence at trial. In these circumstances it becomes difficult for the defence to argue that the confession was

³⁷ McConville and Baldwin, 1981, pp.130-31, 138-40; 1982, pp.166-9.

either false or improperly obtained by some form manipulation or deception performed by the police which is not manifest in the narrative.³⁸

The next case, to some extent, illustrates this point. **Case AP1038** concerned an incident which resulted in the hospitalisation of a two year old boy, the son of D. Two officers visited D at her place of work where the following took place.

- PO: We are making enquiries as to the reason why your son, [S], was admitted to [the hospital].
- D : Because I gave him tablets, that's why.
- PO: [The officer "immediately cautioned" D before asking:] Do you know what the tablets were?
- D : Phenobarbitone.
- PO: Where did you get them?
- D : ... I was clearing out a cupboard at a friend's house and found them on the bottom shelf. I put them in my pocket so her children wouldn't get them.
- PO: You thought they would be harmful to her children?
- D : Yes.
- PO: Thinking that they were dangerous and could even kill him, you gave the tablets to your baby?
- D : Yes and I'd do it again.
- PO: Why?
- D : Because he was getting on my nerves.

She was then arrested and at the police station interviewed by a senior officer.

- PO: I understand that you have already admitted to [the arresting officers] that you gave some Phenobarbitone tablets to you son, [S], is that correct?
- D : Yes.
- PO: You are aware that the tablets that you gave him could seriously harm him and in fact could have killed him as its a poison?
- D : [Crying] Oh yes. I will tell you the truth, I did it to get back at my husband. It was the only way I could hurt him.

This case is merely one example serving to indicate how the police record of any confession may work to limit the scope for challenge either from superior officers, the prosecution, the defence, magistrates, juries or judges.

³⁸ Furthermore, such confessions work to turn the trial process away from functioning to test the case for the prosecution or to evaluate conflicting versions of reality. Rather, the trial becomes merely a means with which to legally validate pre-trial avowals of guilt assumed to have been faithfully reported by the police. See McConville and Baldwin, 1981, pp.28-9.

Just as unverifiable police accounts of their exchanges with detainees may in effect subvert the trial process, they may also serve, as **Case BP1015** demonstrates, to legitimate police decision making. D was arrested on suspicion of having committed a burglary. However, the police record of the formal custodial interrogation indicates that D was willing to confess only to the lesser offence of receiving stolen property.

- PO: I have arrested you because certain matters have come to light and we have recovered property which is stolen.
- D : What's that then?
- PO: A stereo unit from your room. We have searched it with the proprietor, your boss.
- D : Well, that's it then.
- PO: Where did you get it from?
- D : Do you really expect me to tell you?
- PO: That's why I asked the question.
- D : I haven't done any screwing, if that's what you mean.
- PO: I suppose you bought it off a bloke in a pub?
- D : That's about the truth. Look, I ain't a fool. You've got me. I ain't going to "fanny" you. I knew it was "nicked", I bought it for £15. It had to be "nicked" at that price.
- PO: My information is that you've been doing the breakings.
- D : No.
- PO: Well if you paid £15 for it, you must know who you bought it off?
- D : I do but I ain't no "grass".³⁹

D was then told that the police had information to indicate that he had committed the burglary and had disposed of the property with the aid of a named and well known accomplice who had received a prison sentence of four years.

- D : I punted a bit of gear out, yes. Look, I never did any burglaries.... [T]he honest truth is I never did any burglaries... I don't expect you to believe it, but it's the truth.

D was charged with receiving stolen goods. This would suggest that the information the officer claimed to have indicating that D had actually committed the burglaries -

³⁹ The survey of pre-PACE interrogation records found it quite exceptional for the criminal argot attributed to accused persons to be emphasised in the witness statements of police officers by means of quotation marks.

information that was never made explicit - was either fictitious or erroneous. Irrespective of whether the officer possessed the information or whether this was a ploy designed to induce a confession to the greater offence of burglary, it appears to have been immediately discarded in the face of the evidently persuasive claim made by D. The narrative record of the interrogation indicates that the police questioner accepted that D was culpable in respect of the lesser offence of knowingly receiving stolen goods. Other examples from this study of pre-PACE interrogation records suggest that, despite claims of innocence made by the detainee, had the questioner reported himself as having maintained that he believed the accused to be responsible for the offence for which he had been detained and questioned, the inference of guilt - gleaned from the unverifiable yet putatively faithful police account - would have been sufficient to convince a prosecutor that a conviction was probable.

The self-confirming and self-legitimizing capacity of police interrogation records is seen in a slightly different context in the next case. D in **Case BP1101** had been arrested with two others for being involved in breaking and entering a private house and stealing from that house a number of shot-guns together with certain electrical goods.

- PO: You understand why you are here. Is there anything you wish to say? Before you answer, I must tell you that we have recovered the property from [the garage belonging to one of the co-accused].
- D : You know it already. I can't tell you any more.
- PO: From what you are saying, I take it you are admitting breaking into and stealing the property?⁴⁰
- D : Yes.
- PO: Because you are only a juvenile, one or both of your parents will have to be told where you are and someone will have to come to this station before you're charged or any further conversation can take place.
- D : My Mom should be in.
- PO: I will make the necessary arrangements.

When the officer left the interview room in order to contact the parents the remaining officer recorded the following curious conversation:

- D : My Mother's not going to be too "chuffed" considering the raid for them shot guns this morning.

⁴⁰ See note 24.

- PO: Yes, I heard about that. What happened?
- D : It was about 7.30 this morning when the police came round. They searched everywhere for some shot-guns.
- PO: Yes, the information that they had was supposed to be very good. All I can say to you is that guns can be very dangerous. People are seriously injured and even killed every day because of guns.

Here the official record suggests that D was not subjected to any undue interrogative pressures and that the relevant provisions of the Judges' Rules governing the treatment of detainees were meticulously observed. However, it is clear that the first officer was aware that D was a juvenile *before* he had apprised him of the evidence the police had recovered and *before* he had secured the vital admission from him. The arrival of the parents did not impede the police as they sought, through further questions, to prompt D into expanding upon his initial admission made prior to his parents being alerted. The seemingly inconsequential dialogue between the second officer and D shows the latter to have initiated an exchange in which the officer acquaints D (and the external audience) with the strength of the suspicions that had preceded his arrest and interrogation. It also depicts the officer delivering a chastening homily on the dangers of guns while conveying the idea that although their investigative sources may occasionally misdirect them, the police invariable arrest and proceeded against the right man. Such factors may have been intended to justify any "technical breaches"⁴¹ of the rules directed against the custodial questioning of juveniles in the absence of a parent or guardian.⁴²

Case AP1158 clearly demonstrates the absolute control the police enjoyed in the pre-PACE era over suspects detained in their custody. It also illuminates their capacity to deny non-police personnel access to persons detained, to direct custodial dialogues and to manage the manner in which they are reported.

The suspect, who had been visited at her home, was invited to accompany two officers to the police station to be interviewed with respect to an allegation made by her former employer to the effect that she, on diverse dates during the course of the preceding year, had stolen amounts of cash totalling £3000.

- PO: I have to ask you to come to [the police station] with us to be interviewed respecting this allegation made against you.

⁴¹ Devlin, 1960, pp.38-9.

⁴² Judges' Rules, 1964, see accompanying Administrative Directions, number 4.

- D : Alright, but will I be long? There's the children to see to.
- PO: Well your husband [HB] is here, he can look after them.
- HB: I want to come with her.
- PO: [To the husband:] Think of the children, you can come down to the police station later.

Reportedly, during the course of the interview conducted at the police station D eventually made certain damaging admissions. According to the police witness statements, later when HB arrived at the station the admissions made by D were buttressed by the following exchange:

- PO: ... I understand your husband is outside and he wants to see you.
- D : Can I see him?
- PO: Yes, I'll show him in. [After HB had entered the interview room:] Well are you going to tell him, or do you want me to tell him about the money?
- HB: What's this?
- D : I didn't pay it in.
- HB: What are you talking about?
- PO: She's referring to the [money]. She didn't pay it into [her former employer's] bank account.
- HB: [To D] Why?
- D : Because the children needed clothes.
- PO: Would you please leave now. There are certain formalities that have to be attended to in respect of your wife.

Case BP1088 is of interest not only as an illustration of the personality-type who appear to gain relief from the act of confessing.⁴³ It also portrays the confessions elicited from each of the two detainees, under a firm but scrupulously fair officer, as being the product of their being left to reflect upon their guilt or, alternatively, their respective perceptions of the inherent pressures attending the prospect of further detention and interrogation. The police are seen to be formalistic and pedantic in their efforts to ensure that each detainee volunteers their respective confessions.

- PO: Do you want to make a written statement about your part in the affair?
- D1: I don't know. I don't know what to do.
- PO: In that case you will be placed downstairs while [the co-accused] is seen again and I shall see you later. [Moments later:] You have had long enough. Do you want to make a statement about

⁴³ On this see Gudjonsson, 1992, pp.28, 33-4, 68-72.

it or not? You don't have to if you don't want to. If you do you can write it yourself or I will write it for you.

D1: Yes, I'll make a statement. I'm glad it's all over really.

The confession was taken down at the dictation of the accused. In respect of the second detainee, or co-accused, from this case, the record of the custodial interrogation has similar qualities to that reviewed above. The image of the accused racked with guilt who requires - in this instance, after a permissible prod⁴⁴ from the police - and is permitted time to reflect upon the seriousness of his predicament is again evident.

PO: I am DC [P] and this is PC [R]. We are making enquiries into an assault on an elderly woman.... I have reason to believe that you are responsible for that offence with [D1] and I must tell you that you are not obliged to say anything unless you wish to do so but anything you do say may be taken down in writing and may be given in evidence.

D2: You seem to know all about it. Get on with it.

PO: This was a very nasty assault... because that woman was 72 years' old. The consequences could have been more serious than they are.

D2: Let me think for a minute. I want to sort things out. [Moments later:] It wasn't my idea, I was just there.

PO: Would you like to tell me about it?

D2 went on to make a full confession.

A slight variation on the image of the introspective voluntary confessor is found in **Case AP1023**. The accused was arrested after a violent disagreement in a public house in which one of the parties to the incident received a fatal stab wound. During the custodial interview the accused was told that the injured party has died. He was also told that witnesses to the incident had made statements implicating him. Nevertheless, the accused admitted only to being involved in a fight with the deceased not to stabbing him. He was then shown the alleged murder weapon.

PO: Is this your knife?

D: No, it isn't my knife but it is the knife that the bloke was stabbed with. When I had the fight with [the deceased] I was knocked to the floor. I saw the knife on the floor and I picked it up. I

⁴⁴ I use the term "permissible prod" to connote that the comment made to the accused (beginning: This was a very nasty assault....) would appear not to have amounted to an inducement sufficient to offend against the voluntariness test.

don't know why I did it you know. I just put it in my pocket and ran. I can't believe that [the deceased] is dead you know.

PO: You say that knife is the one used to stab the dead man, if you weren't responsible for stabbing him, who did stab him?

D : I'm confused you know. He put a chair over my head and kicked me a number of times and hit [my girlfriend]. I ran. I just wanted to get away.

One of the two officers present then announced that he was leaving the room. As he left he said, "have a think about it and I will return later." The remaining officer reports the accused as having then said:

D : Look, do you know Mr [C] on the Drug Squad? Can you get him for me? I would like to talk to him, we are good friends.

The officer left the room. Detective Constable "C" of the Drug Squad later entered the interviewing room. Alone with the accused, he asked:

C : What's going on [John]? What did you want to see me about?

D : You don't have to tell me I'm a cunt. I was in the [public house]....

The accused proceeded to provide the officer with the details of the stabbing. According to the witness statement of this officer, the monologue of the confessor was interrupted when the officer said:

C : Now listen, I'm going to have to put down what you say because this conversation could be given in evidence. Do you want to carry on?

The accused agreed to continue. On completing his confession he was asked:

C : Have they found the knife?

D : Yes, I got rid of it just as they came.

C : Well, all I can say is the [Detective Inspector] is a fair man but it's entirely up to you as to what you tell him.

The officer then left the accused. Later the detective inspector accompanied by one of the original officers entered the interview room and said to the accused:

- DI: Do you wish to make a statement?
- D : Yes.
- DI: Do you want me to write it or do you want to write it yourself?
- D : You write it. I will tell you exactly what happened you know.

The following two cases are offered as further examples of repentant voluntary confessors. Each confessor appears to have resolved to maintain his innocence until finally, in the police station interview, he evinces a desire to fully come to terms with his criminal liability.

In **Case BP1007** the accused was arrested and interrogated in respect of a complaint made by a bank alleging that he had obtained a loan from them by falsely representing that he had succeeded in securing a lucrative building contract. When first questioned the accused denied the offence. The police account shows that the formal interrogation was terminated after the accused had answered a direct question asking whether he had given the bank a false story in order to obtain the money. The accused launched into the following apologetic reply:

- D : Yes, but I had promised [my girlfriend] a holiday. It meant a lot to me. I know I was foolish.... It was just temptation.... I have let the bank down badly. I know that the bank wouldn't have lent me the money if they had known what I was going to do with it. I am very sorry about it. I would like to say that I am very sorry about all those cheques I wrote out to people that haven't been paid because there was no money in my account. I knew that they wouldn't be paid because there was no money going in at all.... I went berserk really. I have got to be more sorry than anything else. I have been a nuisance to everyone the way I acted. I don't know why I did it.

In **Case PP1025** the accused was formally interviewed in regard to an allegation that he had obtained money by selling forged car insurance cover notes. It is apparent from the police account that the initial reticence exhibited by the accused very soon gave way as he began to answer in full all the incriminating questions put to him by his interrogators. His confession ended with these somewhat hackneyed and ritualistic expressions of remorse:

- D : ... I've been foolish.... I admit I was silly.... I am sorry about this now. I regret the inconvenience caused to everyone concerned through my action in succumbing to temptation.

Of the unequivocally guilty class of detainee, there were a number who appeared in police narratives to consider the prospects of apprehension, prosecution and conviction as

no more than an occupational hazard. In **Case BP1009**, for example, the detainee had been arrested and accused of being involved in burglaries. During the custodial interrogation his questioner asserted:

- PO: It's obvious you've been committing burglaries at public houses.
 D : OK, I'll clear my sheet, but I'm not going to mention anyone else.

The accused then answered a number of questions relating to the method by which the burglaries were committed. Finally, the interviewer suggested:

- PO: You must have had a drop for the spirits and cigarettes.
 D : Obviously, but there's no way I'll tell you. When you go screwing you have got to be prepared to get caught. I've been caught and I'll take what comes.

The accused in the next case is depicted in a similar vein to that instanced above. The accused in **Case PP1095** was one of three men detained and questioned in respect of the theft of a valuable coin collection.

- PO: [D], you know why you have been arrested. For stealing coins and being involved with [D2] and [D3] in disposing of them this morning.
 D : Look son, I want to know what they've said before I say anything.
 PO: Both of them have made statements admitting their part in these offences and they involve you, do you want to see their statements?
 D : I'm not saying anything until I have.

D then read the statements after which he said:

- D : That's what comes of using a couple of amateurs. Okay, the job's down to me, let them off, they're only helping me out they don't know anything.
 PO: Look, with that amount of coins you couldn't have done that sort of job without some assistance.
 D : They weren't that's for sure. I'll have this one on my own. I screwed the pitch and that's all you need to know. You've got the coins you don't need any more.

Case PP1026 is offered as a final example of that class of defendant who, as suspects, appear on the basis of images derived from police narrative accounts of the pre-PACE era, to have little upon which to mount an effective defence.

Having completed repairs to a family house, D in **Case PP1026** is alleged to have returned, forced entry and to have stolen a wristwatch together with a quantity of cash. It was also alleged that he had deceived the householder to obtain payment for the repairs he had effected. When police officers approached D and told him that he answered the description of the alleged offender. D reportedly replied:

D : Fuck off, I don't know what you are talking about.

He was arrested and after being cautioned said:

D : The bastards, they've shit on me, they are all radgy [later when asked what "radgy" meant he is reported to have replied: "Nuts, you know, fucking bonkers."] and the son's a right wanker. He sits upstairs all day and wanks on dirty books.

PO: I'm not concerned about that. You are going with us to [the] police station. Would you mind proving who you are?

D produced his wallet and gave his name. He then asked if he might kiss his wife and child goodbye. He was allowed to do so. He then said:

D : I'm not going with you bastards, I'll take you both on. I'll fucking kill you. I was an amateur boxer.

The police account records that it seemed "obvious from his speech and actions that [D] was intoxicated so [the officers] allowed him to calm down and after about half an hour [they] took him to [the police station]." At the police station D was asked for his wallet.

PO: Where's the wallet [Mark]?

D : Down the fucking drain. Go and look for it. Come anywhere near me and I'll have you both in half a second. I'm an amateur boxer.

Apparently, D then attempted to strike one of the officers who ducked. At this D said:

D : Fooled that time, but I'll wipe the floor you up next time.

PO: Calm down [Mark], you'll only get into more trouble.

At his formal interrogation sometime later the questions put to D centred on the offence for which he was initially arrested.

- PO: How did you get the watch?
- D : He [the householder] threw [it at me].
- PO: Why?
- D : Because he wouldn't give me any more money. He did in the end though. He's shit scared, anything will frighten him, so I had the watch as well.
- PO: Why was he scared?
- D : Oh come on. I got to get me money haven't I?
- PO: You threatened him?
- D : [No reply.]

It is reported that immediately following this apparent refusal to answer, the next series of questions put to D succeeded in eliciting voluntary and damaging admissions in respect of the materials he had used to conduct the repairs though not in regard to the offence for which he had been arrested.

- PO: How much did you get [from the family]?
- D : I had twenty-seven pounds and seventy-two pounds....
- PO: Is that for the materials?
- D : No, they're all over the wall.
- PO: What the lot?
- D : You don't think I'd pay for them do you?
- PO: Where are they from?
- D : Look, if I came up to you and put louvre windows in, two new doors, new tiles on the roof and a few bricks, how much would you pay?
- PO: It would run out at about two hundred pounds.
- D : Well, if I said I would do it for one hundred pounds, you wouldn't ask any questions.

Asked in the seasoned manner if he would like to make a statement about the matter and whether he would like it written for him at his dictation D replied:

- D : No chance, we'll have it out in court. I'm a betting man, I'll take a chance. It's all a good laugh anyway. You can't get me for trying to con them. I didn't get the money, they're too mean. I'll tell you what, charge me, bail me, let me sit on the wall outside and I'll make a statement admitting everything and I'll tell you where I had the tiles from.
- PO: We are not allowed to do that.
- D : No statement then.

Clearly, the events attending this case, as represented in the police narrative of the arrest and interrogation of the accused, convey strong impressions inimical to a presumption of innocence. Here the police may be described as being humane, patient, forbearing and incorruptible in their interactions with the accused. He on the other hand is seen to be volatile, abusive, disrespectful, untrustworthy and unprincipled. Although there is no evidence in the police narrative recording the accused as having made a full confession, the unfavourable images relayed, coupled with the non-interrogation evidence, such as the statements made by the complainants conspire to promote the depiction of him as being unequivocally guilty.

3. Feckless or Inept Detainees

Detainees falling in this class were generally portrayed in police narrative accounts as being feckless of character or inept in their responses to police questions. Their claims to innocence, their explanations or mitigatory remarks as reported by the police often seem weak and implausible. These suspects were also often depicted as failing to appreciate the legal ramifications of their actions or comments. This class of detainee also appeared to be unduly susceptible to real or imagined intimidatory pressures from third persons or, unusually, from the fact of their arrest, detention and interrogation.

The survey of pre-PACE narrative accounts of custodial interrogations purporting to be faithful records of police-suspect exchanges found that those detainees who might easily be characterised as being feckless or inept were comparatively few in number. Nevertheless, it remains possible to isolate and discuss a selection of the cases identified.

The following excerpt from **Case BP1082** depicts the detainee as lacking self-assurance in the face of adept police questions directed not simply to establishing "the facts" but also to bring the suspect to concede that her actions constitute a criminal offence. Though she may be loosely described as feckless, the police record of her custodial interrogation does not convey an image of a thoroughly irreformable malefactor.

The suspect had been detained by store detectives after she had allegedly attempted to leave the store without paying for a pair of sandals. After she had been formally arrested by the police she was conveyed to the police station where she was interrogated.

PO: Right, let's take it from the beginning, why did you put the shoes on?

D : Because my feet were hurting and they were such a relief.

- PO: Until you paid for them they didn't belong to you so why assume you had the right to wear them? Do you normally go into shops and assume that property is yours before you have paid for them?
- D : No, not normally.
- PO: You must realise that the easiest way to get clothing out of a shop without paying for it is to wear it?
- D : Yes I realise that.
- PO: Do you consider what you have done to be dishonest?
- D : Well, I suppose it is but I was going to pay for them.
- PO: Yes, its easy to say that now after being caught leaving the store without paying.
- D : But I was going back to pay for them.
- PO: Going back to pay for them, or going back because you knew someone had seen you take them and not pay for them - that would be for the court to decide.

The police account of this case clearly indicates that the questions put to the accused at her interrogation were posited upon a presupposition of guilt. The form in which the questions were reportedly put to the accused appear to establish definite parameters within which the incident was to be discussed. This seems to have restricted her ability to interpolate her own account of the incident into the exchange and to have limited the scope for her to introduce material unhelpful to the construction of the strongest possible prosecution case. Consequently, she appears in the police narrative as being somewhat feckless both in her seemingly ineffectual attempt to offer a plausible explanation for her actions and in the inadequacy of her challenge to the imputations of her interrogator. On the basis of this account, therefore, the reader and ultimately the court would seem justified in drawing inferences antithetical to the innocence of the accused.

D in **Case AP1017** had been visited at his home after a complaint had been made alleging that he had perpetrated certain indecent acts, including buggery, upon "V" the eight-year-old son of the complainant. According to the witness statements of two police officers, before being taken into custody D was politely told of the nature of their inquiries. D was then dutifully cautioned before he replied:

- D : Oh, this is a shock. I wouldn't do it.... I live with my wife, you don't mind if I tell her do you? I'm always straight with her. [To his wife:] They say that there is some trouble and I have indecently assaulted a boy. You tell them we can't have sex because I can't get an erection can I?

D was arrested and, later at the police station, interviewed. During his detention, however, he was visited in a cell by a lone officer who recorded the following conversation:

PO: Where did you meet [V]?
 D : He came to my room.
 PO: What time did he come to your room?
 D : At about half past one.
 PO: What happened then?
 D : I just played around with [him].
 PO: What do you mean you played with him?
 D : I just touched his little thing.
 PO: What little thing?
 D : You know, his penis.
 PO: So you indecently assaulted him?
 D : Yes but I didn't hurt him, I love him too much. I wouldn't hurt him honestly.

On conclusion of this exchange the officer again visited D, this time accompanied by a senior officer (SO).

SO: You know why you have been arrested don't you?
 D : Yes, for playing around with that little boy, [V].
 SO: I must remind you that you are still under caution and I want to ask you some questions.
 D : Yes.
 PO: I have been told that you have admitted to this officer that you touched and played around with [V's] private parts and on occasions have had him undressed.
 D : No officer, I only touched him on top of his trousers. I love him too much to do anything to him.

Rather than pursue a line of questioning based upon the damaging admissions D was alleged to have made when visited in his cell by the lone officer, the senior officer then reportedly said:

SO: I have talked to [V] and I believe he tells the truth when he says you have had his trousers off and touched and played with his private parts.

The remaining material parts of the formal interrogation are recorded as follows:

- SO: I believe that you have interfered with [V's] bottom but perhaps you have not penetrated his anus, more of going through the motions of just putting your penis against his bottom.
- D : No officer, I didn't. I can't because I cannot get hard. How can I penetrate his bottom? I love [V], I wouldn't do anything to harm him.
- SO: I will ask you whether you have attempted to put your penis in to [V's] bottom?
- D : No officer, I am physically incapable of that act now. I am on drugs.
- SO: Have you then sort of gone through the motion with [V] of putting your penis in his bottom?
- D : I am confused now, I can't really remember. Perhaps I have but I have never hurt [V]. He loves me and I love him....

In **Case BP1099** D had been arrested for allegedly wounding another individual. The police narrative account records that during the formal interview at the police station D maintained that he had been the victim of an attack mounted by a group of men and that the injured complainant (C) was one of their number.

- D : I had to defend myself.
- PO: Well, during the fight did you hit [C] as he has had treatment for a cut to the arm?
- D : I didn't touch him sir, he had a knife and the other man had a stick. The man with the stick tried to hit me and I grabbed the stick.
- PO: ... Do you carry a chopper in your car?
- D : No sir, I have nothing in my car.
- PO: Have you any objections PC [R] searches your car?
- D : No. Here are the keys.

The police witness statements indicate that after ten minutes had elapsed the officer returned.

- PO: PC [R] has just found this broken snooker cue in your car, it was by the driver's seat. What's it doing in your car? It looks like its been used as a club to me.
- D : That's the stick I tell you about. I took it off that bloke when he attacked me.
- PO: Well what is it doing in your car then two weeks after you say you were attacked?
- D : I kept it in case there was any more trouble. I have to protect myself.
- PO: That's a very dangerous weapon. Don't you realise that you could kill somebody with a weapon like that?
- D : It was only protection in case that gang attacked me.

Both the credibility of the accused and the plausibility of his story are undermined by the image of him communicated to the reader through the medium of the witness statements of the officers concerned with his interrogation. The image is of a dissembling and feckless person seeking to evade responsibility for his crime by appearing to be concerned for his own safety, deferential to and cooperative with the police while offering only a weak justification for a cowardly act of violence. Although the record of the interrogation does not directly point to the guilt of the accused, it does suggest that he is untruthful, quite prepared to use excessive force and perhaps willing to lie in order to claim such force was used in self-defence.

Generally, oral admissions alleged by the police to have been made by defendants during their period of detention and interrogation are sufficient, under the rules of evidence, to found convictions. This is so even in circumstances where the alleged admission is not corroborated by a written statement signed by the accused. Thus, while a written confession, when signed by its author, is virtually beyond challenge, an incriminatory oral statement attributed to the accused in the testimony of police witnesses, though unsupported by a written statement, can in practice be critical to the ultimate determination of the case.

The force of an oral admission of guilt unsupported by a written statement signed by the accused is illustrated in **Case BP1207**.

D1 was one of three suspects arrested and interviewed at the police station in connection with the theft of a car.

- PO: You know why you have been arrested. Do you wish to make a statement about this at all? You need not if you don't want to.
- D1: Look, me and [D2] had the car. [D3] wasn't with us when we knicked it, he only came for the ride back to [Broomstone]. I want to make a statement but I can't. If I do [D2] will beat me up. I am scared stiff of him, he's dangerous. He's out to get you you know. You ought to watch your step.
- PO: Thanks for the warning. If you are frightened of him, do you want me to get your solicitor here and he can give you some advice?
- D1: No thanks. He can't look after me and neither can you. I tell you, if I make a statement I'll get a right beating.
- PO: Fair enough. I don't blame you. As far as I can see you have cooperated enough. The court will be told this.

Here, D1 is seen to have made oral self-incriminatory admissions. Yet he appears to have been so inhibited by the prospect of suffering violence from D2 that he seeks to avoid

making a formal written statement. This despite his earlier oral admission implicating his accomplice. The interviewer, however, is shown to be anxious to avoid eliciting involuntary admissions from D1 and to sympathise with his plight. It is of course not possible to determine conclusively whether the fears of D1 were genuine or merely a contrivance designed to justify not making a statement in the belief that an unwritten confession would have little or no probative force. It is equally impossible to determine with any certainty whether the statement attributed to D1 was wholly or partly fabricated. What is clear, however, is that by appearing to sympathise with D1, the officer in his record of the exchange provides justification for the prosecution of D1 on the basis of an unattested and essentially unverifiable oral admission alleged to have been made in the seclusion of a police station.

The survey of police narrative accounts of the pre-PACE era found that the image of the defendant who, fearful of the vengeful retribution of those with whom they are acquainted, appears apprehensive of implicating others, was often associated with young persons and females. **Case PP1212** is an example.

D had been arrested after the police had found stolen property at her home. According to the witness statements of the officers involved, the greater part of her formal interrogation at the police station was directed to the resolution of three questions. The first, whether she took part in the theft of the property; secondly, whether she knew who the perpetrators were; and finally whether she was prepared to identify them. The police narrative indicates that early in their custodial exchange with D they began to accept that she had not taken part in the theft. However, as the following excerpt records, the interviewer believed she knew the identity of the perpetrators.

PO: How long have you been in the house today?

D : All day, why?

PO: If that is correct, you must have seen who brought [the stolen property] into the house.

D : Alright, all I heard was the two of them come. I didn't see any more.

PO: Who are the two of them?

D : Look, I don't know what to say for the best. I know what happened but if I say anything ... the guys who put [the property] there will be out to get me. Please, I don't want to say.

PO: Look [D], you are in enough trouble without covering up for anyone, tell the truth.

D : Let me think for a while. I've got to have time to decide.

PO: [some fifteen minutes later] Well [D], have you thought about what I said?

D : OK I'll tell you.

The exhortation to "tell the truth" together with her being left alone in the police station to consider both her own culpability and her moral duty to cooperate with police was apparently sufficient to induce compliance.

Exceptionally, detainees are depicted in the police narratives of the period under consideration as being timorous not with respect to any expressed concern for perceived threats to their physical safety from avenging criminals but rather for their continued detention by the police. In such situations the fears of the defendant are generally shown in police accounts to be entirely unjustified. The following case is illustrative.

D in **Case BP1056** was accused by the complainant, his former landlord (L), of causing damage to the property of the complainant. D, together with his friend who was suspected of having played a minor part in the offence, was arrested on a Saturday afternoon and conducted separately to the police station. It is reported that on arrival at the police station car park D had attempted to escape. However he was quickly recaptured and then formally questioned in police custody.

- PO: You know why you have been arrested. What have you got to say about it.
- D : I suppose you'll keep me in for the weekend now that I've tried to run away.
- PO: Now don't be silly, that's all over with. You'll probably be bailed later after I do the paper work on you. What have got to say about the damage you caused?
- D : If [L] had opened the door in the first place, there wouldn't be any damage. I only wanted my things.
- PO: Who actually caused the damage?
- D : I'm responsible for that.
- PO: I've now got to complete forms on you. What is your name and address?
- D : I'm not telling you. You'll keep me in anyhow.
- PO: I've every intention of bailing you and your mate as long as I know who you are and where you live.
- D : I don't believe you. All I want to do is tell my wife.
- PO: I'll tell your wife as soon as I know who you are.
- D : I'm not telling you.

Curiously, although D is reported to have admitted responsibility for the damage, he appears unwilling to reveal his name and address - details which presumably could have been obtained either from his friend or the complainant, his former landlord. His apparent fear at the prospect of being detained in police custody for the weekend appears within a dialogue which shows the interviewer as having attempted both to disabuse the accused and to have assured him of his good faith. The impression given is that the interviewer

simply sought to observe his administrative duties but was frustrated in this by the actions of the accused. Indeed, there would appear to be no need for the officer to place undue pressure upon the accused by threatening continued detention as he had already confessed to the crime.

4. *Artful Detainees*

This, the final broad category of frequently recurring images identified in the survey of police interrogation records drawn from the pre-PACE era, comprises a selection of those cases in which detainees appear as individuals who may be characterised as artful or calculating. Typically, the culpability of these detainees is presented in police narratives as being beyond doubt. This is because they are usually reported to have made damaging admissions to that effect, or to have failed to have provided convincing explanations to exonerate themselves before the police. However, the primary feature that unifies this class of detainee lies in the frequency with which they appear in the narrative records as persons who, either after being accused or after making voluntary admissions indicative of guilt then, through various strategies, contrive to either negotiate a deal with the police or to evade prosecution by retracting their earlier admission.

Before turning to a selection of the cases, it should be emphasised that in common with all the interrogation records that were examined, irrespective of the category in which they have been placed, the images identified were, with rare exceptions, unfavourable to the accused. This should not, of course, be surprising particularly when two closely related points are considered. The first stems from the role the police play in a criminal justice process that is based upon the adversarial model. This role, [as has been mentioned], is such that the investigation and prosecution brief conferred upon the police requires them not merely to inquire into the facts of a case but to construct a case for prosecution.⁴⁵ The second point arises from the consideration that the records of police-suspect encounters that formed the data for the present survey were drawn exclusively from prosecution cases that were determined in the Crown Court. Therefore, the cases constructed, together with the images of defendants they contain, would have been assembled in the expectation that each prosecution would culminate in a successful conviction at trial. That said, it now falls to discuss the cases.

Empirical studies of police interrogations conducted during the period under consideration have demonstrated that police officers were prepared to employ a wide range

⁴⁵ See McConville and Baldwin, 1982, p.170.

of psychological techniques against suspected offenders in order to induce compliance.⁴⁶ Apart from the use of threats or blandishments, police officers have been observed to offer inducements, such as the granting of bail, in order to obtain admissions from suspects. The nature of the present study which relies upon the content analysis methodological technique, prevents a direct assessment of such practices. Not surprisingly, such manipulative practices were not immediately apparent from the interrogation records examined. Indeed, in respect to the practice that has been described as "bail bargaining",⁴⁷ for instance, those records suggest that the police *never* indulged in such practices and that when the subject of negotiated bail was raised it was *always* initiated by the accused. **Cases PP1039, BP1067 and PP1004** are examples.

In **Case PP1039** D was arrested and later questioned in police custody with respect to a fight which resulted in one of the participants suffering injuries that required medical attention. In the following excerpt from the witness statement of the interviewing officer D appears as an essentially self-interested individual who, having previous first-hand experience of criminal justice procedures, miscalculates that his written admission, if withheld, might constitute the basis for negotiating bail. However, when confronted by the resolute refusal of the officer to entertain any notion of bailing him, D is shown to have capitulated and perhaps to have calculated that a plea of guilt might attract a sizeable reduction in the sentence he will receive from the court:

- PO: I have been to the Accident Hospital and [the victim] has been detained.
 D : Is he in a bad way?
 PO: He has a cut to the head and a few bruises to the ribs. It is not too serious.
 D : That's alright then.
 PO: Do you wish to make a written statement about the incident?
 D : Can I have bail tonight then?
 PO: No, you will appear before the Court [tomorrow], when you are free to apply.
 D : I won't make a statement then.
 PO: You will in due course be charged with wounding.
 D : I can only admit it.

⁴⁶ Softley, 1980; Irving, 1980; McConville and Baldwin, 1981, pp.192-3.

⁴⁷ See Bottoms and McClean, 1976, pp.199, 204; McConville and Baldwin, 1981, p.192.

The following extract from **Case BP1067** is similar. Here D, confronted by a courteous, dutiful and incorruptible interviewing officer, is also reported to have failed to negotiate bail in exchange for a written admission:

- PO: You are going to be charged with robberies.
- D : If I tell you will you give me bail?
- PO: I will tell you now that you have no chance of getting bail.
- D : Well I've got to try, I might as well tell you about it. I've done these jobs but I didn't thump anybody.
- PO: Do you wish to make a statement?
- D : Yes. You write it.

The theme is replicated in **Case PP1004**. Here, D had been arrested and formally questioned in police custody in respect of the theft of a handbag. Invited to make a written statement, D is reported to have said:

- D : I will not make a statement until I have seen what is happening. You can see me some other time for that. Am I having bail?
- PO: I can enter into no deals about bail and I accept what you say. As far as I can see at the moment you will be having bail tomorrow morning and that is it.

Again, quite apart from the issue of the legal guilt of the defendants in cases such as these, the practically unchallengeable police narrative accounts convey images wholly injurious to the character and creditworthiness of the accused.

While those cases identified in the survey as falling within this category convey clear images of defendants who are depicted as scheming, venal or self-seeking individuals prepared to barter for some immediate gain, typically, police records of the investigation and interrogation process portray their own conduct as being above reproach. However, notwithstanding the generally unverifiable nature of pre-PACE police narrative accounts, the law enforcement picture they present is largely one of uniformly simplistic images constructed in order to assist prosecutorial objectives. Distilled from complex social dramas, these images serve to foster an impression of a "rigid dichotomy"⁴⁸ between the morally reprehensible behaviour of suspects on the one hand and police propriety on the other. Indeed, as McConville and Baldwin have argued, this dichotomy "forms the

⁴⁸ McConville and Baldwin, 1982, p.172.

framework around which the interrogation record is constructed."⁴⁹ Numerous examples illustrating the polarization between the police and the policed were apparent in the pre-PACE interrogation records examined in the present survey, a selection of which may be seen under the categories already discussed. The following three extracts are offered as further examples:

Case PP1187.

The following exchange is reported to have occurred when D was informally interviewed at his place of work. Two officers had visited D, one of two proprietors of a second-hand car dealing business, on suspicion of being involved in the theft and illegal re-sale of cars. On informing D of the nature of their investigations the officers were permitted to search the premises. They then identified a number of cars:

PO: We have pointed out the vehicles to you which have been reported stolen. What have you got to say about them?

D : If you go away and come back this afternoon they won't be here.

PO: We can't do that. What is your explanation?

...

D : Why don't you forget about it. Send me the owners down here. We'll either give them their vehicles back or buy them off them.

PO: You either stole these vehicles or had them off someone knowing they were stolen.

...

D : If we find [a named person implicated by D] will you drop the charges against us?

PO: If [the person who you allege is responsible for the thefts] is traced we will be able to establish the truth.

Case AP1139.

During his formal interrogation in police custody D had persistently denied having been involved in the offence for which he had been arrested. The

⁴⁹ *Ibid.*

interviewing officer reports himself as having delineated the evidence implicating D in these terms:

- PO: Let's look at the evidence. Immediately after leaving your brother's car, the man concerned [the complainant] reported to the police that he had been robbed. He says that he was threatened with a knife. You and your brother both possessed knives when you were arrested. In your actual possession was found a [credit] card, and another [credit] card was found in the back of the car. Both these [credit] cards are apparently the property of the man making the allegations. What have you to say about that?
- D : Look, Mr [D], we will pay him back the money.
- PO: It is not a question about paying back anything. This is a serious allegation, and you and your brother are likely to be charged with robbery. Do you understand?
- D : Well we never robbed anybody.
- PO: We will see you again shortly.

The interview was apparently abandoned at this point.

Case BP1065.

This case concerned the arrest and interrogation of D, suspected of violently robbing a woman of her handbag, of having caused her to suffer injuries in the process, and of stealing a quantity of cash from the handbag.

- D : Who tell you it was me who is supposed to have done this robbery?
- PO: From enquiries we have made I have good reason to believe you were involved.
- D : I can prove where I was the evening the woman was robbed. I was playing basket-ball down [a named] Road.
- PO: ... I haven't told you who was robbed, or what time this offence was committed, yet you know all about it.
- D : So what, one of my mates could have told me couldn't they?... It's got nothing to do with me.... I was in the cafe in [a named] Road.
- PO: What time did you leave this cafe, and who was with you when you left?
- D : I left at half seven and I was on my own.
- PO: When you left the cafe where did you go?

The police account documents that D then gave an account of his movements together with the route he took after leaving the cafe.

- PO: You're telling me lies. You were seen by a number of people [in the street in which the offence occurred] just before the robbery.
- D : What does the woman say happened? Before I say any more, I want to know what will happen to me.
- PO: ... I can't make any promises to you ... from the evidence available, it appears you are responsible.
- D : [crying] But robbery is serious isn't it? I'll get put away. What if I say I took the money and deny hitting her?
- PO: So you admit taking her handbag and stealing the money?
- D : Yeh, I took the bag but I never hit her, I've never hit a woman in my life.
- ...
- PO: Whilst I believe you are now telling me most of the truth of the incident, I am satisfied that you did punch the woman in the stomach in order to steal her handbag and contents, and you will in due course be charged with this offence of robbery.
- D : But I'm not admitting hitting her, then it wont look so bad for me will it?
- PO: Do you want to make a written statement about this?
- D : I might as well.

The statement was dictated to the police and signed by the accused.

Referring to representations of the seemingly unremitting dichotomy that firmly separates the upholders of the law from those who would offend against its precepts observed in their own study, McConville and Baldwin - while accepting that the primary objective of police interrogations was to secure incriminating statements or confessions from suspects⁵⁰ - concluded that interrogations performed a crucial role "in the process of setting the suspect apart from the rest of conforming society and, importantly, of setting the police apart from the suspect."⁵¹ They add that interrogations not only serve to establish the illegal behaviour and morally reprehensible character of defendants, they also produce images of instrumental value that work to create and reinforce a pre-PACE picture of police rectitude, impartiality, propriety and, it may be said, legitimacy. Their thesis gains support from the following excerpts taken from cases examined in the present study:

⁵⁰ McConville and Baldwin, 1982, p.165.

⁵¹ *Ibid.*, p.171.

According to the witness statements of the two officers concerned with the interrogation of D, a suspected arsonist, in **case AP1145**, the following custodial interchange took place:

PO: I have to remind you that you are still under caution. It is alleged by [the complainant] that shortly before midnight [on a specified date] his front door to his flat was kicked open and two bottles, containing a liquid and a rag fuse, which were ignited, were thrown into his hallway, and he saw you standing in his doorway, and then you ran off and got into a motor vehicle.

D : Look, I've had a lot of trouble with that bloke upstairs. I just couldn't stand any more. So I've done a stupid thing, I suppose it was revenge. Look, I'm a bit worried, the papers say it was a bomb. That sounds serious. You know what people think about bombers.

PO: The papers may have exaggerated a little, but this offence is a serious one.

D : In that case I'm saying he's done it himself and blamed me to get me out of the way.

PO: Has [the complainant] been to your house recently?

D : No.

PO: If you are going to say [the complainant] committed this offence himself, where were you at the time of the offence?

D : Miles away.

...

D : Look, I'm saying too much now, I'm not saying any more. Can you contact my solicitor... I'll tell him my alibi and if he considers that you should know I'll tell you.

The reader may question the likelihood of an account that has D volunteering such a damaging admission so early on in the exchange, then - on appreciating the seriousness of the offence, which, evidently, was less serious than he had initially envisioned - almost immediately seeking to resile from it. It may strike the reader as baffling that the police did not seize upon this in order to clarify the inconsistency. Rather the interviewer reports himself as having introduced what appears to be a non-sequitur into the discussion.

The survey of pre-PACE interrogation records found that such highly dubious or indeed implausible accounts of police-suspect interchanges were not uncommon. Not only do these accounts convey images of duplicitous and discredited defendants, they also, however inadvertently, carry images that effectively impugn the integrity of the police record and therefore of the police themselves. The following case is another example:

Case PP1018.

In this case two plain clothed officers in an unmarked police vehicle had observed a youth (D2) who appeared to them to be acting in a suspicious manner. Near to the youth the officers observed a car with its interior lights on illuminating the figure of a "male occupant who was having difficulty in starting the car". The car was then seen "to reverse erratically". The car was stopped and the driver (D1) questioned:

- PO: Is this your car?
- D1: No, its my brother's car.
- PO: Do you know the registration number?
- D1: No, I haven't got a clue.
- PO: Will you turn the ignition off? [D1 did so] Are you sure that this is your brother's car?
- D1: Yes of course.
- PO: I suspect that this car is stolen and I am arresting you on suspicion of taking it. You are not obliged to say anything unless you wish to do so, [the caution].
- D1: I fell for that one didn't I?

The arrestees were taken to the police station where they were separated. A single officer (PO1), alone with D1, reports himself as having remarked:

- PO1: You know why you are here. Do you want to tell me about it?
- D1 : There's not much I can say is there?

"At this point", according to the witness statement of PO1, "Detective Constable [R] came into the room. As Detective Constable [R] entered, [D1] looked up at him and said, 'Why did you have to come in Mr [R], I might have got away with it?'"

- DCR: Well [D1], you know me, let's get down to it, but before you answer anything [D1] you are not obliged to say anything [the caution]. What have you done?

D1 is reported to have made what appears to be a full confession detailing his part in the offence and the part played by D2. The interrogation was then suspended as the detective constable remarked:

- DCR: I'm going to have a word with [D2] now, I'll be back to see you in a few minutes.

On his return accompanied by D2 and the first officer the detective constable reportedly addressed D1 in the following terms:

DCR: I have put some questions to [D2] about his knowledge of what you were up to tonight, but at present he denies any knowledge, so I have brought him in here so that he can listen to some of your answers, which I put to you earlier.

D1 : You might as well tell him [D2] as he knows me and he knows I don't tell him any lies.

D2 is reported to have immediately confessed to his part in the offence.

Conclusion

It should again be emphasised that with the development of the Judges' Rules and throughout the pre-PACE era the pre-trial process was such that police interrogators enjoyed, and indeed sought to preserve, virtually unqualified access to and unconditional control over persons detained in the privacy of the police station.⁵² Not only were the police in a position to exercise unilateral control over the physical conditions under which individuals were held and questioned, they were also entitled to determine whether non-police personnel could attend⁵³ and therefore free to define the terrain of relevant issues over which their custodial interactions with detainees would range.

Thus, during the critical pre-trial period when an individual might be detained and questioned he would normally be exposed to a single, police, version of how the law interpreted his behaviour and to the police view of the weight of the evidence against him. Furthermore, it was the police who determined whether a charge would be preferred, the specific charge upon which a prosecution would proceed and whether the accused would receive bail or be remanded in custody pending his appearance before the magistrates.⁵⁴

Moreover, the police also enjoyed exclusive control over the process under which key custodial exchanges between themselves and detainees were recorded and prepared for public presentation in court. While the vast majority of cases examined in the present study indicate that these records were not made contemporaneously to the events they

⁵² See Holdaway, 1983, pp.23-35.

⁵³ In his pre-PACE observational study, Holdaway found that police officers were "suspicious of this type of intrusion." Holdaway, 1983, p.28.

⁵⁴ Prior to the reforms introduced by PACE, 1984, police bail was successively governed by s.38 of the Magistrates' Court Act, 1952 and s.43 of the Magistrates' Court Act, 1980.

recount, they were, nonetheless, widely viewed as reliable, faithful and comprehensive accounts of the totality of police involvement with and influence over detainees, rather than essentially partisan and partial reconstructions of past events.

Together these factors provided the police with considerable powers with which to emphasise the captive status of detainees, to amplify their own authority and to ensure that those placed at a structural disadvantage in the private space of the police station were subject to strong "lawful" psychological pressures designed to induce compliance.⁵⁵

Clearly, the incidence and impact of such pressures would not usually be readily apparent from privately prepared and unverifiable police narrative accounts, constructed to discredit defendants and establish their guilt. If these accounts enabled the police to construct and present certain standardised and tendentious images of apparently guilty defendants, they might also serve to create and convey particular images of themselves and their role in the adversarial prosecution process. The capacity of the police to present themselves and their work in particular and instrumental ways through the medium of their custodial records will form the subject of the following chapter.

⁵⁵ See Driver, 1968, pp.44-61; see also Garfinkel, 1956, pp.420-4.

PRE-PACE CUSTODIAL INTERROGATIONS: IMAGES OF THE POLICE AND THE INVESTIGATIVE PROCESS

Introduction

In the pre-PACE era orthodox opinion held that despite the difficulties associated with discharging the theoretically discrete roles of investigator, judge and prosecutor when fixed in a single agency, by and large the police functioned in the adversarial process as disinterested and dispassionate inquirers into the objective facts of a case and not merely as seekers of convictions.¹ The image of the police as neutral, quasi-judicial investigators,² for whom custodial interrogations operated as an efficient fact-gathering exercise, finds expression in the 1976 report of the Home Office Committee commissioned to examine the law and procedure relating to identification evidence.³ The Committee was established following a number of miscarriages of justice in which mistaken identification evidence coupled with inadequate investigations - under which evidence that contradicted police case theories was either disregarded or treated as erroneous - had played a part. Its report stated that:

the police have a duty to make inquiries in a quasi-judicial spirit ... to be conducted as much with the object of ascertaining facts which exonerate as of ascertaining those which will convict.... It is because this quasi-

¹ Devlin, 1960, pp.26-31, 62-66; 1979, pp.71-3. Devlin observed that as servants of the state charged to investigate *and* prosecute offenders, police officers were enjoined to be "zealous and even ardent in the pursuit of crime." This, he argued, meant that they could not be expected to be entirely dispassionate. However, he concluded that despite "the general habit of the police never to admit to the slightest departure from correctness", they could, on the whole, be trusted to act fairly, reasonably and in accordance with the provisions of the Judges' Rules. (Devlin, 1960, pp.12-13, 22, 39-40, 43-6, 65-66; 1979, pp.71-3, 81.)

² Devlin argued that under the pre-PACE adversarial system, the investigative and prosecution processes were disjoined. For him, the moment at which impartial, quasi-judicial investigations conducted by the police transformed to become prosecutions geared to secure the conviction of the guilty was marked by the administration of the caution. The caution, he asserted, amounted to "a declaration of war", for in delivering it the police "announce that they are no longer representing themselves to the man they are a questioning as *the neutral inquirer* whom the good citizen ought to assist". (Devlin, 1960, p.31 emphasis supplied.) This rationale is explicit in both the original and revised Judges' Rules.

³ *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases*, 1976.

judicial duty exists that it is not unreasonable to expect a suspect to make a voluntary statement to the police; no such expectation could reasonably be entertained if he were simply giving advance information to the enemy.⁴

Thus, according to the prevailing legal rhetoric, the police were not viewed as the enemy of suspects, instead they were seen in officialdom as impartial, quasi-judicial recipients of voluntarily given admissions - whether exculpatory or inculpatory in nature - *collected* rather than *extracted* from persons detained in custody during the course of criminal investigations. This view of the investigative process permitted police-constructed records of their interactions with detainees to be presented and accepted as incomparably reliable accounts undistorted either by the power differentials which, particularly in the custodial context, favoured the police, or by police perceptions, values or interests.

Having, in the previous chapter, identified four typologies which permitted an examination of specific representations of defendants, it becomes necessary to examine the pre-PACE sample of custodial interviews drawn from Crown Court cases to assess the extent to which particular images of the investigative process and of the police, including that of the neutral, quasi-judicial officer, are reflected and reproduced in the narrative accounts prepared by the police. In meeting this object, the following typologies will be employed to facilitate an assessment of the images identified in the study: (1) the rule-bound officer; (2) the procedural officer; (3) the officer as logician; and (4) the officer as guide.

Again, the law enforcement function of the police, as represented in the pre-PACE records examined, will be discussed with reference to the available anecdotal and empirical evidence relating to custodial interrogations, to the acquisition of incriminatory admissions and to the rhetoric and the realities of the adversarial criminal justice process.

⁴ *Ibid.*, para.5.98, pp.130-1.

Images of the Police and of Police Investigations

1. *The Rule-Bound Officer*

Under this, the first category of insistent images relating to the police and their work, it appeared from the pre-PACE interview records studied that officers were solicitous in upholding the rights of persons they questioned and never departed from the provisions of the Judges' Rules. **Cases AP1204** and **PP1192** are offered as examples.

In **Case AP1204** the police, on searching the home of a married couple, recovered a large quantity of cannabis. Alone in the house at the time, W, the wife of D, was questioned by the officers. She denied having any knowledge of the substances found:

- PO: This was found in your bedroom not hidden away but sitting on top of a box beside the wardrobe door, it would be impossible not to see it, even more so not to smell it. What do you say to that?
- W : Do I have to answer?
- PO: [reports that he gave the usual caution and then explained:] This means that you have the right to remain silent, you have no duty to answer any questions or give any information which would clear you of any suspicion of having committed an offence, nor does it prevent you from making an admission of guilt should that be the case and you wish to do so. Do you understand?
- W : Yes, it is very clear now.
- PO: Do you wish to say anything more?
- W : Yes. It's nothing to do with me. It must belong to my husband. In fact it does belong to my husband. It has nothing to do with me. I am not saying anything more.

Following this, it is stated that she was "invited" to accompany the officers to the police station where further questions ensued. In spite of the assertion made by her interrogator that there was "far too much cannabis for one man to smoke", she insisted she was ignorant of the matter. She was later told that she would be released but might be required to return to be charged. It is reported that she was also encouraged to inform her husband that the officers would like him to call at the station. The next day the husband (D) attended the police station.

- D : Don't you have any worries about me, my wife has told me how well treated she was by you last night and I have been surprised how well treated I have been considering the stories you hear. I have never been in trouble before and I will give you any help you require.

PO: To whom does the cannabis ... belong?

D : To me.

Here, the exchanges recorded in the police narrative present the officers as fastidious observers of the procedural and evidential requirement that statements made by suspects be voluntarily given. Furthermore, W is shown to have been made fully aware of her right to remain silent. Thus, her decision to implicate her husband appears to have been made in conformity with the then prevailing requirement of "voluntariness". With respect to D, his apparent decision to cooperate with the investigation and to provide the police with a decisive admission is presented as being a direct corollary of the non-coercive treatment he and his wife received.

In **Case PP1192**, the image of the rule-compliant police questioner, solicitous to the rights of the detainee, is coupled with the image of the well-briefed investigator for whom the conviction of the guilty is ancillary to his primary concern: solving crime.

After being remanded in custody by magistrates, D was interviewed by the police in respect of the burglary for which he had been charged:

PO: ... I wish to put some questions to you about the offence with which you have been charged. You are not obliged to answer any of these questions....

D : What questions?

PO: Firstly, do you wish to have your solicitor present?

D : What for? I have nothing to say.⁵

PO: The first question is, we now know that a quantity of jewellery is missing from the house you burgled and is not amongst the property recovered from you. Where is it?

D : I don't know anything about it.

PO: I am of the opinion that you have made more than one trip to this house and you have hidden the jewellery in wherever you were living and that is the reason why you have not given your address.

D : That could be right.

PO: Our only interest at this stage is to minimise loss to the owners of the property and to attempt to recover their possessions. Where have you been living?

D : If I've got the property, it's in the flat. What about the man I lived with?

⁵ It should be noted that while D appears to have refused a solicitor on the ground that he had no intention of answering any questions, the police, nevertheless, were fully entitled to continue to subject him to interrogatories. See *Rice v. Connolly* [1966] 2 QB 414.

- PO: I cannot say at this stage. But was he there when you put the jewellery in the flat?
- D : No.
- PO: Well providing he doesn't know it's stolen, or believe that it is stolen, and he hasn't done anything with it, then he would commit no offence.

The narrative record indicates that D then gave his interrogator his address. The man D had referred to was later charged with dishonestly handling stolen goods.

The question beginning: "The first question is...." suggests the interrogator had earlier satisfied himself that D was guilty of the offence for which he had been charged and remanded. Indeed, it would appear that investigations conducted prior to the custodial interview had provided the police with evidence of his guilt and furnished them with the strong suspicion that he had hidden the jewellery. It may be inferred, therefore, that the interrogation was conducted in order to confirm these suspicions, to secure admissions and to recover the stolen property. While the nature of the investigations undertaken is not made explicit, the clear implication is that they were sufficiently exhaustive to provide the police with incontrovertible and reliable intelligence pointing to the offender. This notion is reinforced by the incriminatory responses reportedly made by D to the allegations put to him. These replies effectively transform what appear to be merely speculative police assertions into statements of apparent fact.

Together with the image of the rule-compliant officer, the pre-PACE custodial records exhibited clear images of police interviewers apparently actuated by an uncompromising duty to ascertain "the facts" or "the truth". **Case AP1158⁶** is but one example. During her custodial interrogation respecting the theft of £3000, D is reported to have made the following justificatory remark:

- D : I had to bring up the children without help. There were bills to pay all the time as well as the mortgage.
- PO: Are you saying you attempted to take money?
- D : You don't understand, I had to.
- PO: I can sympathise with you but I must know what has happened to this money.
- D : What do you want me to say?
- PO: I want the truth Mrs [D].

⁶ Previously referred to in chapter 9, at pp.233-4.

In this case, the external audience may conclude that the professed sympathy of the interrogator is clearly and properly subordinate to his overriding duty to dispassionately investigate crime, to secure "the truth" and to record it in an impartial manner for the prosecution of the prospective offender.

Somewhat paradoxically, while the records studied depict the police as largely rule-compliant and disinterested recipients of voluntary statements, it was also apparent that, in their mission to acquire "the truth", police interrogators frequently made clear to those being questioned (and indirectly to external others) that they took exception to evasions, lies and indeed to silence. In short, officers appeared to communicate the idea that only "truthful" voluntary statements would be uncritically received. The following cases are offered as examples.

D in **Case AP1064** had been arrested while waiting at the reception counter of a bank on suspicion of stabbing and causing the death of (S). According to the police account, D was forced into the street and there told of the reason for his arrest. At this D is reported to have said: "He isn't dead is he?" One of the three officers present is reported to have replied simply, "yes". As D was placed in a police vehicle he, it is reported, began crying, saying: "I didn't want to kill him, I didn't think it would come to that." During the journey to the police station he repeated: "I didn't mean to kill him." Upon arrival at the station he was immediately placed in an interview room for questioning:

- PO: Now let's start from earlier this morning, can you recall the squabble you had in the living-room?
- D : Yes, [S] hit me in the face. We were both mad but it wasn't anything.
- PO: What happened then?
- D : I went down the passage to the kitchen, [S] was still in the living-room.
- PO: Where did you actually pick the knife up from?
- D : All I can remember is that it was in my hand, I don't know when I picked it up. I don't know which knife it was.
- PO: Where did you put it down?
- D : I don't know.
- PO: It's no good if you are not going to tell us the truth, you must be able to remember some things.

At one level it would appear that the police interrogated D immediately after his arrest in order to benefit from the distress generated by the knowledge that his actions had caused the death of S and, therefore, to optimise the prospect of securing a confession. Nevertheless, assuming the police record to be accurate, at no point did the officers offend against the rules relating to the taking of statements from suspects. The images transmitted in this exchange, therefore, suggest the failure of D to provide the police with a full account was due to his inability to come to terms with his criminal responsibility.

The representation of police interviewers as uncritical recorders of only "truthful" statements and as rational, professional investigators not easily deterred by evasiveness or duped by implausible explanations is again evident in **Case BP1068**. According to the witness statements of the officers concerned, D was formally interviewed in police custody on suspicion of being involved with two others in a number of shoplifting offences:

- PO: We have just interviewed [Jane] and [Mary] and they admit committing a number of offences of theft at shops in [Eastfield] today.
- D : I don't know what they did.
- PO: When you were arrested you had in your car two pairs of pyjamas and 58 tea towels. [Jane] and [Mary] admit stealing this property from two shops in [Eastfield].
- D : I just sat in the car. I have told you I don't know what they did.
- PO: Do you admit that you were in the car when they brought the pyjamas and tea towels?
- D : Yes.
- PO: Then where did you think they had got this property from?
- D : I don't ask.
- PO: Surely you must have thought that something was funny when they put 58 loose tea towels in your car?
- D : [No reply]
- PO: If you live with [Jane] you obviously know that she has previous convictions for stealing from shops. All three of you are unemployed and yet you travel by car some 15 miles to [Eastfield], with petrol at about 70p. a gallon. Why did you go shopping in the city centre?
- D : We come here a lot but I always wait in the car.
- PO: Do you mean wait in the car to receive stolen property from [Jane] and [Mary]?
- D : No.

- PO: I understand that [Jane] was recently released from prison. I suggest to you that when they came back to your car with the pyjamas and tea towels you knew that they had stolen this property didn't you?
- D : [No reply]
- PO: Are you going to answer that question?
- D : Don't be so impatient. I suppose you pick on me because I'm black.
- PO: Mr [D], I have no interest whatsoever in the colour of your skin. What I'm interested in is the state of your mind when the property was brought to your car.
- D : [No reply]
- PO: Two women with criminal records, both of who are unemployed, bring to your car two pairs of pyjamas and 58 tea towels. You surely are not asking me to believe that you thought that they had obtained this property legitimately?

D was charged with dishonestly handling stolen goods.

Beyond the apparent concern of the questioner to ascertain the voluntarily given facts, it will be seen that D has been drawn into a dialogue in which he has a relatively passive role. The officer, on the other hand, in his formulation of the questions reportedly asked, plays a leading, indeed directorial role. For example, it would appear that the statement beginning: "If you live with...." implicitly posits the expected answer to the appended question. Furthermore, the succeeding question, though clarificatory in form, is in effect leading in nature. Similarly, the next "question" is no more than a statement with an accusation suffixed. That D is reported to have failed to respond to it works to lend credence both to the accusation and to the conclusions voiced by the officer who is apparently unperturbed by the suggestion of partiality. These factors in turn appear to justify his introduction of the criminal antecedents relating to the other defendants.

The capacity of the narrative record to present the police as impartial seekers of objective truth - which, in the pre-PACE cases studied, invariably took the form of "volunteered" admissions - and to convey images of the police as experts in their field who, typically, on the basis of undisclosed criminal intelligence, are able to distinguish honesty from mendacity is exhibited in **Case BP1210**.

The police narrative account of this custodial exchange records that D1 had admitted to being involved in disposing of several stolen television sets but denied stealing them. He implicated others but maintained that his own involvement was limited to transporting the

property after the theft had taken place on the directions of D2 who had retained the television sets and had not paid him for his services.

- PO: Where are the sets now then?
- D1: You'd better ask [D2], he's done us for the money and the sets.
- PO: So far as you are concerned you let a bloke like [D2], a man you have already said you don't know well, get rid of the sets for you?
- D1: Yes that's it.
- PO: That doesn't make sense to me [D1]. Do you really expect us to believe that?
- D1: I don't care. [D2] is your man, I can't tell you where the sets have gone. You get [D2] and you'll get your sets.
- PO: Do you wish to make a statement about this, its entirely up to you, you don't have to if you don't want to....
- D1: Do you want me to plead guilty to stealing them?
- PO: All I'm concerned about is the truth [D], its up to you entirely.
- D1: I'd better leave it then.

Later, D2, separately detained and questioned in the police station, reportedly admitted that he, acting with one other, was responsible. The police interrogator turned his attention to the identity of the accomplice:

- PO: According to our information there was another man involved with you also.
- D2: No, there was only the two of us.
- PO: I understand that [X] was the third man.
- D2: [After having "remained silent for a moment"] Oh, you know about him do you?
- PO: It seems that way doesn't it? What's the point of leaving him out?
- D2: Alright, so he was with us but I don't want to mention him. You must know that he's already wanted by the police.
- PO: There's no point in us continuing this interview if all you are going to tell us is a load of lies.

The following excerpt is offered as a final example of a police narrative record from the pre-PACE era which *ex facie* demonstrates that non-coercive, rational and persistent custodial questioning, without having recourse to overtly manipulative ploys - even when faced with denials and evasions - is usually sufficient to secure damaging voluntary admissions.

D in **Case BP1062** was one of a number of individuals arrested in connection with a fight that had occurred in a public house. At his formal custodial interview he was accused by the police of causing the complainant (FP), one of the parties to the dispute, to suffer injuries to his face:

- D : What are you on about, I am the complainant. It was me that had the glass in the face.
- PO: I know that but a man named [FP] also has a glass pushed into his face.
- D : I'm not doing porridge for that.
- PO: Did you put a glass in his face?
- D : No, not me.
- PO: [FP] says that the man who got into the ambulance with him and who had cuts to his face was the man who hit him in the face with a glass.
- D : I didn't want to go in the ambulance with that lot.
- PO: But you did get into the ambulance and you had cuts to your face didn't you?
- D : Yes, and the guy who did me was in the ambulance with a blonde bird.
- PO: [FP], who had the glass in his face, says that the man who did it got into the ambulance and you got into the ambulance.
- D : It was an accident.
- PO: What do you mean?
- D : He came up to the bar and took a swing at me. I swung round and hit him with a pint glass.
- PO: You will be charged with wounding this man.
- D : If I put my hands up for this I'll get porridge?

2. *The Procedural Officer*

The impression that pre-PACE interviews were typically conducted by police officers *after* they had first undertaken thorough - though usually unspecified - investigations, emerged as a clear characteristic of the pre-PACE interrogation records studied. **Case PP1192**, discussed above,⁷ is an example. The following cases are also indicative.

In **Case PP1034** D was visited at his home by two officers. The nature of their inquiries were reportedly communicated to D in the following terms:

⁷ At pp.261-2.

- PO: I am Detective Sergeant [X] and this is Detective Constable [Y]. Last October you reported to your insurance company that your car had been stolen and you had reported the theft to the police. All these things were untrue. Your car had been repossessed by your finance company and you obviously knew this.
- D : Yes, that's true, but I did report it to the police. I telephoned [a named police station].
- PO: We are from [that police station]. I have checked and there is no record that you have ever reported the theft of your car at that station or any other.
- D : I telephoned but I had an appointment so I couldn't wait.
- PO: On the day you told your car insurance company your car had been stolen you were visited by two men from the finance company who told you that they intended to repossess the car. Why have you never checked with the company to see if they had the car?
- D : I didn't bother but I tell you, as far as I am concerned I did nothing wrong.
- PO: The two men who called told you they were going to take the car, they say you picked up the keys from a shelf in your room and you became quite agitated, they then left and took the car. You then find your car missing, it was obvious who had taken it.
- D : I didn't get agitated. I told them I would make a payment at the end of the month.
- PO: You knew your car had been repossessed and if the money had been sent by the insurance company you would have kept it.
- D : Yes, I would but I didn't find out until January when my landlady told me that the car had been repossessed.
- PO: If that were true why did you not report that to your insurance company, and go and see the finance company about the property you had left in the car?
- D : I didn't bother.
- PO: I am satisfied you made a false claim to your insurance company and I must ask you to come with me to [the police station] for further enquiries.

According to the witness statements of the two officers concerned, at the police station D was shown the application form he had submitted to the insurance company:

- PO: On the form you also state that you have never been convicted of any driving offences. This is also not true. You have two convictions, one for speeding and one for driving without a licence or test certificate.

D : I thought they didn't count after they were more than three years old. But anyway I can't see that I've done anything wrong.

It would appear from this extract that the police had conducted sufficiently extensive investigations prior to the interview with D to enable them to contest or refute any misleading answers offered in response to their questions. D is seen to have been given an opportunity to account for his actions. However, his remarks, as recorded by the police, are unsatisfactory. Consequently, his arrest and prosecution are shown to be manifestly justified. It would also appear that the questions asked were framed both to elicit admissions indicating D possessed the requisite criminal intent to commit the alleged offence and to damage his credibility. The introduction of his previous convictions, though potentially prejudicial to a fair trial, serves this strategic end.

Case AP1126 concerned the theft of a quantity of assorted cheeses valued at over £4000. D was employed as a van driver by the complainant company to deliver the cheeses. According to the police account, during the formal interview at the police station D adhered to his initial claim that the van had been stolen by persons unknown to him. The following extract suggests that the truth emerged as a direct result of the competence of the interviewing officer and his reliance upon traditional, pre-interview, investigative methods.

PO: ... would you tell us exactly how much cheese was on the van when you left [the depot]?

D : It was a full load, that would probably be just over two and a half tons, that's all.

PO: Now think carefully [D], are you sure that is true? My information is that the van was overloaded in fact it was carrying almost double the normal load.

D : Yes, that's right. I didn't tell the police that because of trouble about overloading.

PO: It's in your own interests to tell us the truth [D]. We obviously know more about this matter than you are prepared to tell us at the moment.

D: OK, I honestly haven't been able to sleep since this lot happened two weeks ago. I will tell you all about it but you understand I cannot tell you names.

In common with the many cases identified as falling within the present class of pre-PACE images, the nature of the criminal intelligence claimed to be possessed by the police is not fully articulated in the interrogation record. It is, therefore, difficult to determine the true extent of the police knowledge. Regardless, it is reported that D went on to tell the police where the stolen cheese could be found, the arrangements that had been made for its disposal

and made a full confession respecting his part in the offence. Moreover, as the confession is documented in a police narrative account that reveals no conspicuous breaches of the Judges' Rules, its exclusion from evidence by the trial judge would seem improbable.

The ability of interviewing officers, apparently on the basis of meticulous pre-interview investigations, to expose implausible or disingenuous statements made by those questioned together with their capacity to communicate - both to detainees and to external others - their conclusions are evident in the following excerpt from **Case PP1012**.

The accused in this case was arrested and interrogated in connection with selling a car with a stolen MOT certificate.

PO: We've done a lot of checking into your [Newmobile] car and what you've told us just isn't true.

D : What do you mean?

PO: You told us [P] had taken it to [Sheepston].

D : Yes, well I couldn't tell you could I?

PO: Why not?

D : [K] had it.

...

PO: How long have you had the car? I remember seeing it [recently].

D : I bought it last summer off a bloke in [Longthorpe]. It's in the books.

PO: When you bought it, what colour was it?

D : Dark blue, the same as it is now.

PO: And he gave you the log book?

D : Yes.

PO: For [a specified registration number (FAB1)]?

D : Of course.

PO: You are telling lies.

D : How do you mean?

PO: We have found [FAB1] behind a garage in [Thornstreet].

...

D : Alright I'll tell you, I've updated it a year.

- PO: What do you mean?
- D : I bought two scrap [Newmobile] and made it into one.
- PO: How did you do that then?
- D : I had [one] off a bloke called [T] and I bought the shell of [FAB1] and the plates for that one on it.
- PO: I don't believe you.
- D : Well its the truth and when you find [K] you'll find the [Newmoblile] and you'll see I'm not telling lies.
- PO: Now let's get it straight. You are saying you bought the whole shell of [FAB1]?
- D : Yes, except the engine.
- PO: Now that just isn't true.
- D : It is but I only took the parts I needed.

...

- PO: It's obvious to me that you've done that to disguise the fact that [FAB1] was a write-off and if you drove it long enough someone would discover it and recognise that it had been in a 100 miles an hour smash.

D was then shown copies of documents relating FAB1, he is reported to have accepted that they were endorsed with his signature.

- PO: So you claim to have updated [a Newmobile] which you have no record of buying. You took a chassis plate which you were not entitled to take off another scrap motor car, which didn't belong to you and you turn up with a nice [Newmobile XP4] which is supposed to be [FAB1] and obviously isn't. You can't even tell us where this Mr [T] can be found. All the dates of the so called transactions appear fictitious. You make fictitious entries in your books. You have a visit from the police to inspect it. You tell lies as to its whereabouts and then allow it to be taken by a man who you knew we were looking for and it has now disappeared. All in all that takes some swallowing.

While D is not reported as having made a distinct confession it is clear that his credibility and therefore his ability to contest the case before the Crown Court were impaired by the representation of his conduct exhibited in the police narrative account. Critical in this respect is the explicit deprecation of the accused and the unfavourable evaluation of his explanations reported to have been made by his patently sceptical questioner.

3. *The Officer As Logician*

The third category of frequently occurring images derived from the pre-PACE police interviews examined has as its unifying theme the representation of custodial encounters between police officers and detainees in which the former appear as discerning, proficient and rational inquirers who record voluntarily-made statements pointing to the criminal responsibility of those questioned simply by applying elementary logic. In contrast, detainees generally emerge from these encounters as inept or idiotic individuals whose crude or irrational prevarications are easily confounded by simple and reasoned questioning.

The following extract from **Case BP1121** is here presented as but one example of a police narrative account that contains images of a custodial interchange in which persistent, logical and apposite questions are seen to undermine the credibility of the explanation offered by the detainee.

D, following his arrest and detention at the police station, had initially denied being involved in an incident which had resulted in the complainant sustaining serious injuries. Later, however, he reportedly admitted that a fight had occurred during which he had injured the complainant but maintained that he had acted in self defence.

- D : ... he took a swing at me.
- PO: Did he connect?
- D : No, I moved out of the way.
- PO: Then what happened?
- D : I hit him with a bottle.
- PO: Did you pick up the bottle?
- D : No, I had it in my hand all the time.
- PO: Was it broken?
- D : No.
- PO: Did you break the bottle before you hit him?
- D : No.
- PO: What sort of bottle was it?
- D : A small one.
- PO: How many times did you hit him.

D : I don't know.

PO: Did the bottle break when you hit him?

D : Yes.

PO: Did you hit him more than once?

D : I don't know.

PO: It must have been more than once because he had cuts on his forehead and chin.

D : It was more than once.

PO: How many times then?

D : I don't know.

PO: He has cuts on his face, on his forehead and jaw, which required over sixty stitches, so it must have been more than once.

D : [No reply]

PO: When you hit him did the bottle break over his face?

D : Yes.

PO: Do you call this self-defence?

D : He was trying to punch and kick me, and you have to defend yourself.

PO: Not with a bottle.

D : [No reply]

PO: Isn't the truth that you thought he was a police informer and you deliberately attacked him?

D : No.

PO: Well if it was I can assure you that he was not a police informer.

D : That had nothing to do with it.

PO: Do you wish to make a written statement about this?

D : I make no statements.

It is evident that in spite of the forceful exertions of the questioner D refused to make an admission that explicitly contradicted his claim that he had acted in self defence. Nonetheless, he emerges from the custodial exchange with not only his story but also his character tarnished.

The following narrative account excerpted from **Case AP1031** is offered as one of a number of similar cases which appear to indicate that police officers who employ non-coercive questions founded upon deductive logic are, on that basis, ordinarily sufficiently well equipped to reveal to external others the culpability of those reasonably suspected of involvement in crime.

In this case it is reported that D had been arrested and detained at the police station on suspicion of receiving stolen cash, the property of an individual who had been assaulted and robbed by D1 in the toilet of a public house:

- PO: The lad that was robbed had about £10 cash stolen, only £4 of which has been recovered. Did you have any money?
- D : No, I did not.
- PO: Did [D1] speak to anyone afterwards, except the police?
- D : No.
- PO: So he couldn't have passed the rest of the money to anyone else. Is that right?
- D : I suppose not, no.
- PO: Was there anyone else in the toilet when D1 went through the lads' pockets?
- D : No, only me then....
- PO: Well if [D1] didn't give the money to anyone else, he must have given it to you.
- D : No, he never done that. But he dropped £2 on the floor as he came out of the toilet.
- PO: What happened to that afterwards?
- D : I don't know, I never had it.
- PO: The police searched up there afterwards and the money wasn't there then, so where did it go?
- D : I don't know.
- PO: I believe that when you wiped the lad's face with a towel, it was an act so that the police would not suspect that you were involved in the robbery. Is that true?
- D : No. It's not.

D later dictated a statement to his interrogators in which he admitted receiving the cash stolen. However, *ex facie*, the custodial dialogue recorded by the police is of itself a compelling illustration of the virtues of traditional detective skills and common sense logic when utilised in the context of custodial interrogations.

The following two extracts are further examples of police narrative accounts from the pre-PACE era which depict the triumph of common sense logic over malfeasance.

In **Case BP1074** the formal interrogation of D followed his arrest and detention in police custody in regard to his alleged involvement in the theft of furniture belonging to the complainant, his former landlord.

- PO: It seems funny to me that the day you left the house unexpectedly this property disappeared. You were the only one in the house when it went.
- D : Look, I've told you, this Welshman was living there.
- PO: No he wasn't. He had left before then.
- D : Had he? I can't really remember, I was on drugs around then....
- PO: Are you trying to tell us that you cannot remember what happened?
- D : Yes.
- PO: Does that mean you cannot say whether you took the furniture or not?
- D : Yes, that's about right.
- PO: Well, the stuff was taken from the house the day you left. You didn't tell [the landlord] that you were going. You were the only one living at the house apart from [the landlord]. The house was not broken into, therefore, it must have been done by someone in the house.

The police account of **Case PP1136** relates that D had been arrested and detained in police custody on suspicion of having stolen a stereo music centre. It is reported that D was charged with the offence following this exchange:

- PO: [Peter] we have made enquiries ... and the description we were given ... fits you. Is there anything you wish to say?
- D : My name ain't [Peter] it's [Dave].
- PO: Are you [Olive Oil's] boyfriend?
- D : Yes.
- PO: Is it right that you lived at [a specified address] with her?
- D : I did for a few weeks but that don't mean I stole [F's] stereo.
- PO: How did you know it was [F's] stereo that was stolen?
- D : [No reply]
- PO: The only way you could have known that was if you had stolen it.

In common with many similar pre-PACE cases studied, these extracts contain images of criminal investigations which suggest that in the context of custodial interrogations, the common sense logic of the questioner played a crucial part in exposing the criminality of those questioned. Such accounts appear as faithful records of a process in which questioner and questioned interact on relatively equal terms, with the latter free to elect not to participate. Under this process all spurious or implausible explanations offered are rationally assessed and

eliminated by the specialist inquirer who leaves external others to draw their own logical inferences. This theme may be observed in the following extract from **Case BP1177**.

D1 and D2 were arrested and questioned at a police station on suspicion of attempting to sell a car knowing it to have been stolen. The arrestees contended that they had not known the car was stolen. They maintained that they were merely passengers, that the driver, a third party (G), had initiated the sale and that this person, who had led them to believe he owned the car, had gone to buy cigarettes just before their arrest and had therefore escaped:

PO: Where is this man [G]?

D1: When we stopped the car [G] got out and went for some cigarettes.

PO: That's rather odd, when you were arrested you had some cigarettes on you. Don't you think it's funny that he should leave the car and go and get some cigarettes?

D1: No.

PO: How long were you at [the site of the intended sale]?

D1: About ten minutes, I cant remember.

PO: There are several shops close to [that site] which were open, [G] could have got some cigarettes and joined you at the premises before the police arrived.

D1: [No reply]

The interview was broken off and later resumed:

PO: I have just interviewed your friend and he is very vague as to any details about the third person who was supposed to be in the car, and also he declined to make a written statement about the matter. I would feel that if the story he told was the truth he would have nothing to lose by committing it to paper.

D1: It's up to him.

PO: He has given a different story as to how he met you today.

D1: He can say what he wants to.

PO: If you are both innocent respecting this vehicle, surely the story which you both tell would be identical?

D1: [No reply]

The material parts of the interview with D2 are recorded by the police as follows:

- PO: Do you wish to make a written statement about this matter?
- D2: No. I don't make statements to the police until I've seen my solicitor.
- PO: Do you wish me to contact your solicitor?
- D2: No.
- PO: Are you saying that you are quite innocent and you didn't know that this vehicle is stolen?
- D2: Yes.
- PO: Well, if you are innocent why don't you make a written statement giving your version of what is the truth in this matter?⁸
- D2: I don't want to make a statement.
- PO: Would it be true that if you made a written statement about what you know about this vehicle in so far as when you first saw the vehicle, who was with you, and what you did up until the time you were arrested, this could be compared with the statement which [D1] has made...?
- D2: Yes.
- PO: It would obviously be vastly different to the story you would give.
- D2: He gives his story, I'll give mine later.
- PO: I'll read you the statement made by [D1]. [After reading the statement over to D2:] What have you to say about that?
- D2: Nothing.

From this extract it would appear that rational argument failed to induce damaging admissions from the detainees. It may, however, be objected that the narrative record of the custodial dialogue between the police and the arrestees, allied with the refusal of D2 to make a written statement, would of itself form reasonable and sufficient grounds for inferences unfavourable to innocence to be drawn.⁹

The capacity of the police in their narrative accounts to openly express an opinion on the weight of the evidence, the plausibility of an explanation or the character of the person questioned is seen more clearly in the following category.

⁸ Clearly, this question is premised upon the widely held common sense assumption that only the guilty would wish to exercise their right to silence. As the Criminal Law Revision Committee (CLRC, Eleventh Report, 1972) put it "it is only natural to expect an innocent person who is being interrogated to mention a fact which will exonerate him." (Cmnd.4991, para.37.) The Committee went so far as to suggest - without the support of empirical evidence - that hardened criminals tended to take advantage of the right to refuse to answer pre-trial questions and that this greatly hampered the police (*ibid.*, para.30).

⁹ See Cross, 1970, pp.70-2; CLRC, Eleventh Report, 1972, Cmnd.4991, p.16.

4. *The Officer As Guide*

The large majority of pre-PACE records examined were found to exhibit images that suggested the police merely received and meticulously chronicled statements "voluntarily" made by those they questioned. For the most part, these statements appear as the un-coerced and uninfluenced effusions of the person questioned, made without critical comment by the questioner. However, the survey found a substantial number of cases in which officers were recorded as having made evaluative comments. The comments here referred to may be distinguished from those discussed in the preceding category on the ground that they do not appear as the product of rational argumentation. Typically, they appear as expressions of justifiable impatience or irritation. Outwardly, such comments are addressed to the person questioned; however, their influence in this respect is not easily ascertained. Nevertheless, the manner in which they appear in the narrative accounts would suggest that the external audience is of foremost concern. The four cases that follow will illustrate the point.

The first, **Case AP1089**, concerned the interrogation of D, one of three persons arrested and accused by the police of being involved in a burglary.

- PO: Right [D], you know what you've been arrested for and I have cautioned you. Have you anything to tell us?
- D : I was there but I didn't go in.
- PO: What did you do?
- D : Well, the other two had decided they were going screwing when we were in the pub. I didn't want to go.
- PO: Well, why did you go? You knew what they were going to do.
- D : Well, you know how it is, you can't say no.
- PO: That's ridiculous, everyone had a choice and you have got a mind of your own. Let's start at the beginning, who drove the car?

This extract is one example of the pre-PACE custodial interview in which questioner is seen to register his negative estimation of the accused for the edification of external others. In this case the officer communicates his conviction that at the time of the alleged offence the accused possessed the proscribed state of mind (the *mens rea*) which together with the

prohibited act (the *actus reus*) is traditionally a precondition to the infliction of any punishment handed down by a court having jurisdiction over criminal matters.¹⁰ The officer also makes clear that in his expert opinion the criminal responsibility of the accused could not be negated or mitigated by claims that his free-will had been impaired by "peer pressure".

Further examples of the apparently justifiable reprobation of arrestees during their interrogation by the police may be seen in the following extracts. The first from **Case BP1010**, the second from **Case PP1084**.

In **Case BP1010**, the police record documents that D was arrested on suspicion of having knowingly received a television set alleged to have been stolen from a recently burgled public house.

PO: ... we've arrested [B] and he has admitted a burglary at a pub and a colour TV was stolen.

D : That one in my flat is [P's], it's not stolen.

PO: How long have you had it?

D : Ages, I'm not sure but it will be in the agreement.... I definitely didn't have it of [B].

PO: You have told us nothing but lies.... First you claimed you didn't know where [B] was but you have known all the time.

D : Well, he's a friend I couldn't tell you could I?

...

PO: ... You told me earlier you knew someone was committing burglaries and low and behold we arrest your former partner and he admits committing pub burglaries. So when we have information that you have a stolen TV, what are we to think?

...

PO: Why did you say the one in your house was [P's] when you bought it at the garage? You tell so many lies you don't know how to tell the truth.

D : I knew what you'd say as soon as I told you who I had it off.

PO: Do you wish to make a statement about it?

¹⁰ See *Harding v. Price* [1948] 1 KB 695, p.700, *per* Goddard, LCJ.

The interrogation record of **Case PP1084** documents that D, together with two other youths, was arrested on suspicion of stealing batteries valued at £4.38 from a service station kiosk. It had been alleged that one of the three youths had been seen by a police officer to filch the batteries. On being approached by the officer the youths made off. Later that day D was apprehended. He maintained that, though present at the time, he had not been involved in the alleged offence. According to the police account, on route to the police station D was asked why if he was innocent he had left the scene:

- D : I know it looks bad but I was doing nothing wrong.
- PO: ... why clear off ... if you've done nothing wrong?
- D : Well, I got a bit scared. I know what you lot are like. I don't want to get involved with the law.
- PO: ... you are talking a load of rubbish. You cleared off when you saw the policeman at the kiosk and when we knocked your front door because you've been thieving and you had a guilty conscience didn't you?
- D : No I didn't honestly, you've got to believe me.

Case PP1006, the final case to be discussed within the present class of pre-PACE images of the police and their practices, concerned an individual who, after having been under police surveillance, was arrested and accused of living on the earnings of a prostitute. According to the narrative record, during the formal interrogation of the accused the police interrogators intimated they were sceptical as to his ability to subsist on social security payments totalling £22 per week:

- PO: And you say you can live on that? How much rent do you pay?
- D : £5 a week.
- PO: What about gas and electricity, do you pay that?
- D : Yes, its meters.
- PO: What about food, who buys that?
- D : I do, we don't eat much. Anyway, I don't let [her] buy anything when I'm around.
- PO: And you both smoke, you both drink, and you can afford to play cards in the pub. All on £22 a week.
- D : ["made no comment"]
- PO: ... you dress well, you go out drinking most nights. You and [Lolita] both smoke heavily and you play cards for money. You expect us to believe you can manage that on £22 a week?

- D : I'm very careful, we don't go out every night anyway.
- PO: What you are saying is you know [she] was soliciting but you don't let her spend any of the money she gets because you provide everything for her on £22 a week....

Implicit in the scepticism seen to have been voiced by the questioner is a clear and unfavourable assessment of the life-style, credibility and culpability of the accused. This is common with numerous similar cases, some of which have been discussed above, indicates that the pre-trial interrogation of accused persons in the pre-PACE era provided the police with an essentially unverifiable and unchallengeable means with which to transmit to the courts their disinterested opinions on the "facts" discovered and statements received. Indeed, in the overwhelming majority of the pre-PACE interrogation records examined the provisions then regulating custodial questioning and the taking of statements appeared to have been observed punctiliously.¹¹ In short, the clear impression conveyed in the pre-PACE narrative accounts of custodial interviews is that officers invariably complied with the direction to "scrupulously avoid any method which could be regarded as unfair or oppressive".¹²

Conclusion

It has been seen that the interrogation process which prevailed pre-PACE gave the police sovereignty over both the conduct of interrogations and the accounts of interrogations. It has been suggested here that police accounts played a crucial role in legitimating the function and character of the police. Moreover, they served to communicate to external others distinct and functional of the police themselves and of those interrogated by the police. How far the themes highlighted in this and the preceding chapter, respecting images of the police-suspect dynamic in the interrogation process of the pre-PACE era, have currency in interrogations conducted under the PACE regime will be addressed in the following chapters.

¹¹ An appearance that may be attributed to the manner in which the pre-PACE custodial exchanges were recorded. It has been contended that the non-contemporaneous narrative accounts followed "an accepted formula" designed not only to foster the finding of legal guilt but also "to establish that police officers ... behaved entirely in accordance with the Judges' Rules." (Lewis and Hughman, 1975, p.111.)

¹² Home Office circulars No.31/64, para.4; and No.89/78, para.2.

CUSTODIAL INTERROGATIONS UNDER THE PACE REGIME: IMAGES OF DETAINEES

Introduction

The preceding two chapters discussed the particular ways in which both interrogees and interrogators were represented in a sample of police-constructed narratives from the pre-PACE era relating to the detention and interrogation of person whose cases were committed for trial in the Crown Court. The following two chapters will be concerned with an analysis of a sample of interrogation records, also drawn from cases determined in the Crown Court, relating to custodial interactions between detainees and the police in the period following the implementation in January 1986 of the 1984 Police and Criminal Evidence Act (PACE) and its associated Codes of Practice. However, before discussing the impact of the PACE reforms upon the recording of police interrogations and the images those records disclose of the police-suspect dynamic, it is necessary to conduct a brief review of the key socio-legal and political conditions that stimulated the legislative reforms.

The Regulation of Custodial Interrogations - Judges' Rules to PACE Codes: An Outline of the Reform Process

From its enactment in 1984, the Police and Criminal Evidence Act has become a central feature of the British criminal justice landscape. It endures as an initial legislative attempt to rationalise the law relating to police powers and aspires to provide a comprehensive code delimiting the rights and duties of police officers as they bear upon the liberties of the citizen.

In respect of the reforms pertaining to the detention and interrogation of suspects effected by the Act, the source of the debate which informed them may be traced as far back as the period following the initial promulgation of the Judges' Rules at the beginning of the present century. From this period the police institution evolved to become an increasingly professionalised, politicised and vocal constituent in twentieth-century law and order discourse.

By the middle of the century, with the revision of the Rules, the contours of the debate had become fixed.¹ Notwithstanding the risk of oversimplification, it is helpful to divide the disparate participants to this debate into two broad schools or factions. The first school may be distinguished from the second on the ground that its members were generally of the view that procedural prescriptions relating to the investigation of crime, the reception of criminal evidence and the conviction of the guilty unduly inhibited the police in the performance of their law enforcement duties. The rules, therefore, needed to be altered if the police were to succeed in their mission.²

In contrast, the second broad school of thought comprised those who argued that the police regularly abused their existing powers and that the courts were reluctant to discipline the police when clear breaches of the rules had occurred.³ It was also argued that persons subjected to detention and interrogation were inadequately protected from the widespread violation of their somewhat ill-defined rights and were liable to convictions based upon essentially unverifiable police reports of interrogations. For this school the private nature of the events attending the taking of statements from suspects by the police coupled with the problem of establishing the authenticity and reliability of statements alleged by the police to have been made by suspects, who nevertheless contest them at trial, were crucial matters of concern requiring urgent review.⁴

Thus, while questions were being raised regarding the sufficiency of police investigative powers, the effective regulation of those powers and the adequacy of the protections afforded to suspects detained and questioned by the police, the authentication of statements made to the police and the reliability of confession evidence was to endure as an integral aspect of the debate.

¹ As has been seen, the 1964 Judges' Rules were introduced against a historical backdrop of considerable concern regarding the conduct of custodial interrogations, their effective regulation and the reality of police practice. See above, chapter 8.

² See Chapter 8, above. See also McNee, 1979, p.85; Greenawalt, 1974, pp.236, 238, 248. And see Mark, 1978, p.55, where he argues that should the police "apply the existing laws and procedures according to the letter. The effect would be disastrous. Only the weak, the spontaneous and intellectually underprivileged would continue to be amenable to the law".

³ Again see Chapter 8, above. See also Cox, 1975, p.164; McBarnet, 1978, pp.458-60.

⁴ For an official acknowledgement of these concerns see the final report of the *Royal Commission on the Police*, 1962, Cmnd.1728, para.369. For an earlier judicial expression of concern see *Thompson* [1893] 2 QB 12, p.18, *per* Cave J.

During the 1970s each of the schools received some support for their respective views with the publication of two major reports which together provided conflicting pictures of the criminal justice process.

Towards a Royal Commission

In 1972 the Criminal Law Revision Committee furnished the debate with a major, if controversial, report.⁵ The Committee had been asked by the Home Secretary in 1964 "to review the law of evidence in criminal cases" and, in particular, to consider "what provision should be made for modifying rules which have ceased to be appropriate in modern conditions."⁶ Its report concluded that the prevailing law of evidence was both too restrictive and illogical. It argued that the artificial and irrational restrictions that led to the rejection of evidence "which would obviously have been valuable for the ascertainment of the truth"⁷ were the product of an age when "the scales used to be loaded against the defence".⁸ These evidential rules, it felt, no longer served any useful purpose in a modern criminal process where improved access to legal representation, greater rights of appeal against conviction and increasing levels of sophistication on the part of criminals has combined to "become a hinderance ... to justice."⁹ The Committee therefore proposed that the laws of evidence be reformed so as to be "less tender to criminals generally."¹⁰

In respect of confession evidence and police interrogations, the Committee contended that adverse inferences should formally be permitted to be drawn from the silence of a defendant who seeks to rely upon a fact which he failed to mention to the police when questioned.¹¹

⁵ Eleventh Report, *Evidence (General)*, Cmnd.4991.

⁶ *Ibid.*, p.5.

⁷ *Ibid.*, p.10.

⁸ *Ibid.*, para.21, pp.10-12.

⁹ *Ibid.*, where the report speaks of a "large and increasing class of sophisticated criminals" who skilfully exploit their rights in order to avoid conviction.

¹⁰ *Ibid.* Indeed, the committee felt that the laws of evidence had led to the assumption that defendants had "a sacred right to the benefit of anything in the law which may give them a chance of acquittal, even a technicality, however strong the case is against them." *Ibid.*, p.15.

¹¹ *Ibid.*, para.29, pp.16-17; and see pp.17-34, 68-9.

Consequently, the caution, traditionally administered by police officers at the outset of an interrogation, to inform the suspect he is not obliged to answer, should be replaced by a notice warning him that of the danger of remaining silent.¹² It also argued that in circumstances where adverse inferences might be drawn from silence this should be capable of acting as corroborating evidence.¹³ Finally, the Committee advocated a refinement of the common law rule which in its "excessive strictness" rendered inadmissible all statements made in consequence of threats or inducements.¹⁴ It recommended that the rule should "be limited to threats or inducements of a kind likely to produce an unreliable confession."¹⁵

The recommendations of the commission and the Benthamite assumptions they expressed both reflected and supported the essentially crime control views of the then recently appointed Commissioner of Metropolitan Police, Sir Robert Mark, who had become an increasingly articulate spokesman for the proposition that the criminal justice system was being manipulated by criminals who, aided by unscrupulous lawyers, were evading conviction.¹⁶ Nevertheless, after provoking vehement dissension, primarily directed to the proposed relaxation of the right to silence, the immediate implementation of the recommendations made by the Criminal Law Revision Committee was averted.¹⁷

The second of the reports to influence the debate presented a picture of the criminal justice process that ran counter to that tendered in the report of the Criminal Law Revision Committee. Published in 1977, the Fisher Report was the result of a two year inquiry into the

¹² *Ibid.*, pp.24-6.

¹³ *Ibid.*, para.40, p.23.

¹⁴ *Ibid.*, pp.41-44.

¹⁵ *Ibid.*, p.43.

¹⁶ See *The Sunday Times*, 2 July, 1972, pp.14, 16; *The Times*, 6 October, 1973, supplement, p.2; *The Times*, 7 November, 1973, p.5; "Minority Verdict" the Dimpleby Lecture given by Robert Mark, (1973) 90 *The Listener*, pp.613-18, reprinted in Mark, 1977, pp.55-77. See also Reiner, 1980.

¹⁷ See generally, Devlin, in *The Sunday Times*, 2 July, 1972, p.16; Simon, 1972, *The Times*, 5 October, p.17; MacKenna, 1972, pp.605-21; Cross, 1973, pp.329-40; *The Times*, leader, 16 February, 1973, p.19; Miller, 1973, pp.343-355; Zuckerman, 1973; Zander, 1974, pp.954-55; Devlin, 1979, pp.441-2. Although the Commission, somewhat hesitantly, suggested that experiments with tape-recorders in police interrogations should be conducted (Eleventh Report, *supra.*, n.5, at pp.28-33), its report was criticised for its failure to explicitly recommend measures to alleviate the defects in recording procedures employed by the police when taking statements. See Gerstein, 1979, p.91.

Maxwell Confait case.¹⁸ In 1972 three boys, aged fourteen, fifteen and eighteen, had been questioned by the police in connection with the death of Confait after his body was found in his blazing home with strangulation marks about its neck. On the basis of the confessions the boys made to the police during their respective interrogations - some of which being conducted without their parents or any other non-police actor being present - two of them were convicted of murder and all three of setting fire to the house in which the deceased lived to destroy the evidence. In October 1975 the boys were freed after the Home Secretary had referred the case to the Court of Appeal which quashed the convictions when fresh evidence showed that the youths could not have committed the offences for which they were convicted and, therefore, their confessions could not be relied upon.

The Fisher Report provided an authoritative vignette of the prevailing investigation and prosecution process and found that it exhibited weaknesses at several levels. For Fisher, the Confait case demonstrated that it was possible "for a prosecution based wholly (or almost wholly) on uncorroborated confessions to proceed to trial without proper steps having been taken to seek evidence to support or contradict the evidence of the confessions".¹⁹

With regard to the custodial interrogation of the boys by the police, Fisher found that senior officers had contravened the Judges' Rules and their Administrative Directions "without adverse comment from higher ranking police officers, from the officers of the Director of Public Prosecutions, from Treasury counsel, from defending counsel or from the judge at trial."²⁰ Indeed, not only did Fisher conclude that the requirement that persons in custody be told of their right to consult a solicitor²¹ "had become a dead letter",²² he also found that the Judges' Rules were "not known to police officers and members of the legal profession".²³ He

¹⁸ *Report of an Inquiry by the Hon. Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6, 1977.*

¹⁹ *Ibid.*, p.19. The police gave evidence to Fisher admitting that once the confessions had been obtained from the boys, "enquiries continued only to strengthen the evidence against them." (*Ibid.*, p.23.) McBarnet (1978, p.456) argues that such convictions were possible not because of any "accident or freak occurrence" but because of the structural forces that operate "in a system based on adversarial investigation and advocacy".

²⁰ Fisher Report, *supra.*, n.18, p.162. And see pp.11, 17-18.

²¹ See principle (e) of the preamble to the Judges' Rules and Administrative Direction No.7.

²² Fisher Report, *supra.*, n.18, p.162. Empirical research conducted prior to and soon after the Fisher Report confirmed that suspects were habitually denied access to legal advisers by the police. See Zander, 1972; Baldwin and McConville, 1979; Zander, 1979.

²³ Fisher Report, *supra.*, n.18, p.13.

therefore called for "the sanction for breach of the Judges' Rules ... to be certain and regularly applied", since "[a]t the moment it is neither."²⁴

The findings of the Fisher Report challenged the assertion that the criminal justice process had erected too many safeguards for suspected and accused persons to the benefit of the guilty.²⁵ The report was, therefore, generally welcomed by members of the "due process" school. Nevertheless, throughout the 1970s, members of the "crime control" school - such as senior police officers who had been exhorting officers to expose misguided public opinion to the evidence that they alone, as experts in the field, could adduce²⁶ - continued to contend that investigations into crime were made more difficult by the unnecessary constraints the criminal justice system imposed upon its law enforcement officers.²⁷ Indeed, the successor to Sir Robert Mark, Sir David McNee, went so far as to confess that:

many officers, early in their careers, learn the art of manipulating the law to their advantage, and, in the investigation of crime, begin to use methods which border on trickery and stealth.²⁸

This he ascribed to laws and procedures which, he claimed, encouraged police officers "to rely on bluff and stealth - and on occasions force - in order to carry out their duties effectively."²⁹

²⁴ *Ibid.*, p.17. For subsequent cases evincing similar features to that of Confait and illustrating that police "bad habits die hard" see Baxter and Koffman, 1983, pp.19-21; Thomas, 1987, pp.219-20.

²⁵ See for example, Mark, 1977, pp.55-73.

²⁶ See for example, Mark, 1966, p.319; Mark, 1978, Foreword, in Critchley, *A History of Police in England and Wales*, p.xiii.

²⁷ See Mark, 1977, p.63. See also Kettle, 1980, pp.23-27; Chibnall, 1979, pp.135-49.

²⁸ McNee, 1979, p.78.

²⁹ *Ibid.* It would seem that for McNee, such contributions from the police to the ongoing law and order debate, even when clearly designed to influence both public and Parliamentary opinion, did not conflict with the "political neutrality ... and impartiality" he professed to be "central to the British policing system." (McNee, 1979, *The Guardian*, 25 September, p.25.) His predecessor was more explicit: "We who alone see the reality and the recorded crime should not be reluctant to speak about it. We who are the anvil on which society beats out the problems and abrasions of social inequality, racial prejudice, weak laws and ineffective legislation should not be inhibited from expressing our views, whether critical or constructive." (Mark, 1977, p.118. And see pp.41-3.) See also McNee, 1983, pp.180-2; Manning, 1977, p.167; and see *supra.*, n.27.

Thus, the "due process", "crime control" criminal justice debate of the 1970s³⁰ may be understood as having been largely based upon "a growing concern among British policemen that their capacity to cope with routine crime was inadequate and that their powers needed strengthening both in terms of increasing equipment and personnel and, more importantly, changing legal procedure to increase probabilities of detection, conviction, and stiffer punishment."³¹ This however conflicted with the "evidence of increasing abuse of existing powers by police and a growing number of allegations of brutality, discrimination, and malpractice."³² Such evidence brought one legal commentator to conclude that the realities of the existing criminal justice system were such that it had "already given the police and the prosecution the very powers they [were] demanding."³³ Therefore, it was argued, "[t]he law does not need reform to remove hamstrings on the police: they exist largely in unrealised rhetoric."³⁴

In the wake of a series of "moral panics" associated with law and order, such contradictory conceptions of the criminal justice process, following a proposal advocated by Fisher,³⁵ led the Labour Government, in June 1977, to announce the setting up of a Royal Commission on Criminal Procedure (RCCP). In February 1978 it was directed, by its terms of reference, to examine: the powers and duties of the police in the investigation of crime; their affect upon the rights and duties of suspects; the prosecution process; and to make recommendations regarding criminal procedure and evidence; while "having regard both to the interests of the community in bringing offenders to justice and to the rights and liberties of persons suspected or accused of crime". Under the chairmanship of Sir Cyril Philips, the Commission received evidence from a wide range of interested bodies representing crime control and due process concerns. It also commissioned an unprecedented number of research studies into the pre-trial criminal process and published its final report in January 1981.³⁶

³⁰ Also described as a debate between "Libertarians" and "Utilitarians". See Gernstein, 1979, pp.95-114.

³¹ Reiner, 1983, p.144.

³² *Ibid.*

³³ McBarnet, 1981b, p.155.

³⁴ *Ibid.*

³⁵ Fisher Report, *supra.*, n.18, pp.6-7.

³⁶ Royal Commission on Criminal Procedure, *Report* (1981) Cmnd.8092 (RCCP, *Report*).

Detention and Interrogation: Proposals of the RCCP

On the issue of the detention of suspected persons by the police, the Commission recommended that while the arrest of a person without warrant by the police should continue to be governed by the prerequisite of "reasonable suspicion", the category of "arrestable offences" should be widened to incorporate all offences punishable with imprisonment³⁷ and a limit should be imposed on detention upon arrest to ensure that it was restricted "to those cases where the circumstances indicated it is necessary".³⁸

Under the "necessity principle" proposed by the Commission, detention would apply at the police station when the arrestee was received into formal custody by the station officer who would be required to keep a "custody sheet" detailing his reasons for sanctioning the detention.³⁹ The "custody sheet" would also record details relating to the exercise or police refusal of the right of all suspects both to have someone notified of their detention⁴⁰ and to have access to legal advice.⁴¹

After noting a "great variation" in the circumstances that brought suspects into police custody and registering an appreciation of the "pressures of work on the investigating officers",⁴² the Commission concluded that such factors militated against the establishment of

³⁷ RCCP, *Report*, para.3.83. Under the existing law the police were entitled to arrest, without a warrant, any person reasonably suspected of committing an "arrestable offence"; these included those offences carrying a statutory maximum sentence of five years imprisonment on first conviction (Criminal Law Act, 1967, s.2.). For a comprehensive list of police powers of arrest without warrant prior to their rationalisation see RCCP (1981) *The Investigation and Prosecution of Criminal Offences in England and Wales: the Law and Procedure*, Cmnd.8092-1, appendix 9.

³⁸ RCCP, *Report*, para.3.76.

³⁹ *Ibid.*, para.3.77.

⁴⁰ *Ibid.*, paras.478-80.

⁴¹ *Ibid.*, para.4.87. The Commission recommended that these "rights" be subject to a police discretion to refuse them "where it is not in the interests of the investigation or the prevention of crime or of the arrest of other offenders" that they be exercised. (para.4.80.) For a similar police discretion regarding legal advice as proposed by the Commission see paras.4.89-91. This discretion would appear to conflict with the expressed wish to make the right to legal advice an effective right through the development of duty solicitor schemes (see paras.4.97-98).

⁴² *Ibid.*, para.3.99.

"short and absolute time limits" for continued detention after arrest.⁴³ As the time limits must "enable the police to do their job properly" and must "have due regard to the rights of the person detained", an absolute time limit "established by reference to some arbitrarily imposed mathematical norm" applicable to all cases, was simply not possible.⁴⁴ The Commission therefore recommended that where the detention of an arrestee was justified on the "necessity principle" the police should be free to detain for six hours before charge. After this point and before the elapse of twenty-four hours, if the arrestee was yet to be charged a uniformed inspector unconnected with the case should be required to satisfy himself of the need for continued detention and to record this in the "custody sheet".⁴⁵

With respect to "grave offences",⁴⁶ the Commission proposed that the police, on having obtained magisterial authorization, should be able to detain uncharged suspects beyond the twenty-four hour period for a further twenty-four hours.⁴⁷ On the elapse of forty-eight hours, the police would reapply to the magistrates for an additional extension of up to twenty-four hours. This detention, however, should be subject to a right of the uncharged person to appeal.⁴⁸

Turning to the extra-judicial interrogation of detained persons and the admissibility of confessions recorded by the police, a majority of the Commission, while being "sympathetic to the position taken by the Criminal Law Revision Committee", favoured the retention of the privilege against compulsory self-incrimination (the right to silence) in both its pre-trial and trial forms.⁴⁹ The report of the RCCP relates that the Commissioners accepted that the rule designed to exclude those confessions that had not been voluntarily made, the "voluntariness" rule, contemplated that for a suspected person police interrogations were necessarily coercive,

⁴³ *Ibid.*, para.3.100.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, para.3.104

⁴⁶ *Ibid.*, paras.3.7-8.

⁴⁷ *Ibid.*, para.3.106.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, paras.4.52-3, 4.63-6. All but one of the Commissioners, however, supported the view adopted in the Eleventh Report of the Criminal Law Revision Committee (*supra.*, n.5. para.104) to the effect that the right of the defendant, under the 1898 Criminal Evidence Act, to make an unsworn statement at his trial was a "useless anachronism". RCCP, *Report*, para.4.67.

also that their freedom of choice might be impaired, as might their ability to exercise their right to silence, and that in consequence the reliability of statements made in police custody had to be rigorously tested.⁵⁰ However, the Commissioners found that the long standing judicial test for determining the "voluntariness" of a confession and hence its reliability did not concur with the psychological evidence which suggested that "custody in itself and questioning in custody develop forces upon many suspects which ... so affect their minds that their wills crumble and they speak when otherwise they would have remained silent."⁵¹ They therefore concluded that as legal and psychological "voluntariness" did not match, and as the concept of voluntariness embraced by paragraph (e) of the Judges' Rules was ineffective as a rule of conduct for the police, the rule should be abandoned.⁵²

Not only did the Commission recommend the renunciation of the "voluntariness" test, it also advocated that the Judges' Rules themselves be abandoned. It argued that the conduct of police questioning should be regulated by a statutory code of practice to "replace the vagueness of the Judge's Rules" and "provide strengthened safeguards to the suspect and clear and workable guidelines for the police".⁵³ The primary purpose of the proposed code of practice would be "to minimise the risk of unreliable statements."⁵⁴ While the code should include "an explicit condemnation and prohibition of the use of violence" and a recognition of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Commission felt that it should not, indeed could not, proscribe specific tactics employed by the police aimed at producing confessions.⁵⁵ Nevertheless, a breach of the code should not "lead to total immunity for the suspect from prosecution and conviction or to the automatic exclusion of evidence."⁵⁶ And since the exclusion of evidence was not a satisfactory way of securing compliance with the rules,⁵⁷ this would be achieved by a combination of

⁵⁰ *Ibid.*, para.4.68.

⁵¹ *Ibid.*, para.4.73.

⁵² *Ibid.*, and para.4.109.

⁵³ *Ibid.*, para.4.109; and see paras.4.109-114.

⁵⁴ *Ibid.*, para.4.110; and see para.4.133.

⁵⁵ *Ibid.*, paras.4,132-3.

⁵⁶ *Ibid.*, para.4.133.

⁵⁷ *Ibid.*, para.4.132.

contemporaneous controls, supervisory checks, disciplinary measures applied internally by the police and by criminal or civil actions through the courts.⁵⁸ However, since the primary objective of the code would be to ensure the reliability of the evidence obtained, evidence obtained in breach of it would not be accepted "uncritically and without comment by the criminal courts."⁵⁹ Additionally, while the Commission accepted that jurors and magistrates should be advised of the dangers of acting upon a statement obtained in breach of the code, it was opposed to the introduction of a formal corroboration requirement on the ground that injustices would flow if confessors could not be convicted solely on the basis of their confessions.⁶⁰

Finally, in order to counter the problem of disputes over the accuracy of oral statements attributed to defendants, the Commission proposed the development of improved note-taking techniques.⁶¹ Interviewing officers should make "contemporaneous verbatim notes" of custodial interviews so as to better resist challenges to the police record made at trial.⁶² Where a contemporaneous record is not made or where a suspect elects not to make a formal statement, the interviewing officer should note down the main relevant points made within and outside the police station.⁶³ This process should be tape-recorded with the consent of the interviewee who should be invited to make comments in respect of his treatment and of the synopsis.⁶⁴

⁵⁸ *Ibid.*, paras.4.117-30.

⁵⁹ *Ibid.*, para.4.133.

⁶⁰ *Ibid.*, para.4.74.

⁶¹ *Ibid.*, paras.4.12-15.

⁶² *Ibid.*, para.4.12.

⁶³ *Ibid.*, para.4.13.

⁶⁴ *Ibid.*, para.4.27. The Commission considered the widespread employment of tape-recording to be "impracticable" because of the estimated cost and "overwhelming operational difficulties." (para.4.20; see also paras.4.21-4.) It did, however, recommend its gradual introduction (para.4.25). Furthermore, while it felt that considerations of cost also militated against the immediate introduction of videotaped interviews, the Commission did not want to discourage the police from using it "when they felt that the circumstances warrant it." (para.4.31.)

An Evaluation

The Commission had accepted that arrest produced in some suspects a "sense of alarm and dismay" and "represents a major disruption" to their lives.⁶⁵ Yet, in spite of evidence indicating that "people are wrongly arrested solely for the purpose of questioning them",⁶⁶ it recommended - as one of its five criteria proposed to limit detention upon arrest to those cases where it was "necessary" - that detention be authorised where the police needed "to secure or preserve evidence ... or to obtain such evidence from the suspect by questioning him".⁶⁷ Set against some of its own research studies, one of which found that of the sample of suspects arrested by the police, 86 per cent of them were subsequently interrogated⁶⁸ and another which suggested "that the process of interviewing results in a very high validation of the initial suspicions",⁶⁹ this recommendation may be seen as a call for the legitimisation of existing methods which allowed the police to determine when detention was necessary.

In its discussion of the detention and interrogation of suspects the RCCP premised its conclusions upon the assertion that "there can be no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime."⁷⁰ The report states that this observation was based upon "knowledge of other countries" and the results of research it had commissioned.⁷¹ However, that research, particularly the empirical research conducted by Baldwin and McConville,⁷² demonstrates that only 7 per cent of their sample of cases would have been fatally weakened had the police failed to secure damaging statements from defendants.⁷³ This research is supported by other empirical research also conducted for the

⁶⁵ *Ibid.*, para.3.75.

⁶⁶ *Ibid.*, para.3.69; Steer, 1980, pp.96-119.

⁶⁷ RCCP, *Report*, para.3.76, criterion (d).

⁶⁸ Softley, 1980, p.76.

⁶⁹ Irving, 1980, p.150.

⁷⁰ RCCP, *Report*, para.4.1.

⁷¹ *Ibid.*

⁷² Baldwin and McConville, 1980, RCCP Research Study No.5.

⁷³ *Ibid.*, pp.27-33. See also McConville and Baldwin, 1980, pp.993-95; McConville and Baldwin, 1982b, pp.165-175

Commission. This research found that police investigators would have abandoned proceedings in only 8 per cent of the cases that formed the sample had the police failed to obtain incriminatory admissions during interrogation.⁷⁴ Furthermore, other research, again for the Commission, indicated that in other jurisdictions, particularly the United States, police interrogations played a relatively minor role in the prosecution process.⁷⁵ In spite of this evidence - and additional findings discussed by the Commission which revealed that 75 per cent of suspects detained by the police were charged within six hours and that 95 per cent were charged within twenty-four hours⁷⁶ - it recommended an extension to the period within which the police might detain and question uncharged suspects.⁷⁷

In suggesting that the treatment of those detained under the "necessity principle" would be governed by a code of practice which would replace the Judges' Rules and provide "a clear and enforceable statement of the rights and safeguards for suspects in custody",⁷⁸ the Commission failed to clearly specify the terms of the code. Rather, it elected to leave the formulation of the code to the Home Secretary and Parliament.⁷⁹ This, as one commentator observed, was "a major omission in view of the centrality of the proposed code in the structure of the Commission's suggestions for reform."⁸⁰

For the Commission, the "voluntariness" rule and the judicial discretion to exclude improperly obtained confession evidence could be abandoned⁸¹ since the code would better control police behaviour, safeguard the rights of suspects and protect against the use of unreliable statements.⁸² Where the code was breached the jury would be warned, without a formal corroboration rule, to look for independent support for the statement having been

⁷⁴ Softley, 1980, p.94, and see p.87.

⁷⁵ Morris, 1980, pp.10, 13.

⁷⁶ RCCP, *Report*, para.3.96.

⁷⁷ *Ibid.*, para.3.104.

⁷⁸ *Ibid.*, para.4.75.

⁷⁹ *Ibid.*, paras.4.111, 4.15-16.

⁸⁰ Inman, 1981, p.471.

⁸¹ RCCP, *Report*, paras.4.73, 4.131.

⁸² *Ibid.*, para.4.118.

made.⁸³ In short, the Commission sought to transform the issue of the reliability of an adduced statement from one concerned with its admissibility under the traditional rule, to one concerned with the probative weight it should be accorded not by a judge but the jury. It was argued by a critic of this proposal that it would increase the risk of wrongful convictions based on evidence that is highly prejudicial⁸⁴ and often decisive in the resolution of a prosecution.⁸⁵

The Commission argued that abolition of the "voluntariness" rule was justified on two grounds: the first, it was ineffective as a means of controlling the police⁸⁶ and, secondly, legal and psychological voluntariness did not coincide.⁸⁷ To this it might be objected that a possible solution would be to attempt to broaden the legal definition of voluntariness and to strengthen its function as a means of deterring police misconduct. To suggest, as the Commission does, firstly, that in practice the "disciplinary principle" has been rejected by English judges,⁸⁸ secondly, that it can only apply in the small proportion of cases that are contested⁸⁹ and, finally, that American research had exposed its ineffectiveness,⁹⁰ indicates an inadequate and partial treatment of the capacity of the exclusionary rule to act as an incentive to police compliance.

"The primary duty to ensure that the rules are obeyed should", as far as the Commission was concerned, "rest with the police service itself."⁹¹ This assertion betrays the extent to which the

⁸³ *Ibid.*, paras.4.133, 4.74.

⁸⁴ Inman, 1981, p.472. In support of this contention Inman cites the research of Baldwin and McConville, (1980, RCCP, Research Study No.5.) who found a high correlation in their sample between confessions made to the police and conviction rates.

⁸⁵ See Devlin, 1960, p.48; Morris, 1980, p.12.

⁸⁶ RCCP, *Report*, paras.4.69, 4.73.

⁸⁷ *Ibid.*, para.4.73.

⁸⁸ *Ibid.*, para.4.124, citing the judgment of Lord Diplock in *Sang* [1979] 2 All ER 1222, p.1230.

⁸⁹ *Ibid.*, para.4.125.

⁹⁰ Inman shows that the Commission misapplied the American research which was primarily concerned with the exclusion of improperly obtained real evidence and not the exclusion of confession evidence. She demonstrates that "far from supporting the Commission's view [that research] supports the *opposite* conclusion." (Inman, 1981, p.475, emphasis supplied.)

⁹¹ RCCP, 1981, *The Balance of Criminal Justice*, Summary of the Report, p.11.

Commission placed its faith in the impartiality and integrity of the police. It also betrays an unwillingness to consider the implications of the official inquiry that had acted as a catalyst in the setting up of the Commission⁹² and had revealed a clear relationship between wrongful convictions and the ability of the police to flout rules designed to protect suspects from "unfair and oppressive" treatment.⁹³

An illustration of the faith the Commission placed its presupposition of police probity is found in its consideration of the problem of so-called police verbals.⁹⁴ As McConville and Baldwin point out, the Commission "merely translates the problem in to acceptable terms. The problem, as it sees it, is not that verbals might be intentionally *false* but that the recording of them might not be wholly *accurate*."⁹⁵ Indeed, in the view of the Commission the solution lay in improving the accuracy of police records of custodial interrogations through better note-taking and the piecemeal introduction of tape-recording.

However, in directing the larger part of its discussion towards the development of measures to better ensure the accuracy and reliability of statements made to the police in the context of formal, police station interviews, the Commission failed to address itself to the continued scope its recommendations would afford the police to fabricate, alter or coerce statements said to have been made voluntarily by suspects during low visibility or off-the-record exchanges.⁹⁶ Proof of such statements would, under its proposals, continue to be dependent upon the generally unverifiable assertions of officers who may have collaborated in the preparation of their account of the exchange.⁹⁷ The failure of the Commission to address this issue not only

⁹² Fisher Report (1977) *supra*. n.18.

⁹³ *Ibid.*, para.2.13.

⁹⁴ That is, the police fabrication or alteration of admissions attributed to suspects. See RCCP, *Report*, para.4.2.

⁹⁵ McConville and Baldwin, 1982a, p.296, (emphasis supplied).

⁹⁶ Although such exchanges may occur outside as well as within the police station, (see, for example, Williams, G., 1979, pp.10, 12-15; McConville and Morrel, 1983, pp.158-.) the Commission appears to have contented itself with the finding that in respect of Crown Court trials, "there were few cases where the prosecution was greatly assisted by evidence of conversations held outside the police station" (para.4.3), and the consideration that since the majority of defendants pleaded guilty, comparatively small amounts of court time was spent with challenges to the accuracy or authenticity of police interrogation evidence (para.4.7).

⁹⁷ *Bass* [1953] 1 QB 680. See also Williams, G., 1979, pp.12-13, where he argues that in these circumstances the police account is "virtually impregnable" especially where defendants have criminal records. And see McConville and Baldwin, 1981, pp.165-6.

suggests that it premised its proposals respecting the recording of statements upon a somewhat "naive view of the meaning of 'verbals', which diagnoses the problem as inaccuracy rather than the fabrication of statements",⁹⁸ it also implies an inadequate appreciation of the role the police play in a criminal justice process that is based upon adversarial values. The rhetoric of the law suggests that this role is confined to "*discovering* whether there is evidence that will support a prosecution of the suspect or cause him to be eliminated from the enquiry."⁹⁹ In practice, however, that role requires the police to construct the strongest possible case against defendants for the purpose of securing convictions,¹⁰⁰ which in the context of custodial interrogations manifests itself in procedures that are essentially inquisitorial in nature.¹⁰¹

It is clear that the problem of ascertaining what took place during exchanges between the police and defendants presents considerable difficulties for both the prosecution and the defence.¹⁰² However, while PACE has broadly implemented the procedures for regulating and monitoring police interrogations proposed by the RCCP,¹⁰³ with the intended object of protecting suspects and police officers,¹⁰⁴ this leaves unanswered questions as to the value to be accorded to contemporaneous recordings, whether by notes or other electronic devices; the extent to which such devices may limit or obscure police malpractice; their impact upon police control over the construction of reality for external others; and the completeness and reliability of the records such devices produce.

⁹⁸ McBarnet, 1981c, p.113.

⁹⁹ RCPP, *Report*, para.1.7 (emphasis supplied).

¹⁰⁰ See Fisher Report (1977) *supra*. n.18, para.2.30; Devlin, 1979a, pp.71-2; McBarnet, 1978, p.456; McConville and Baldwin, 1981, pp.124-5, 189-93.

¹⁰¹ See Devlin, 1979b, p.442; and Devlin, 1979a, p.78.

¹⁰² McConville and Baldwin, 1981, p.166.

¹⁰³ For an account of the reception the report of the RCCP received from interested and concerned parties to the "law and order" debate and for a discussion of the place of its recommendations (a number of which were amended or lost) in the legislative process, through the 1982 and 1983 Bill stages, to form the basis of the 1984 Act, see Reiner, 1985, pp.167-69; Freeman, 1985, pp.vii, 5-6; Zander, 1985, pp.xv-xvii; Leigh, 1986, pp.91-117.

¹⁰⁴ See RCCP, *Report*, paras.3.94, 4.31.

The Legislation

The 1984 Act (together with the Prosecution of offences Act, 1985¹⁰⁵) effected major changes to the criminal justice process. As a largely codificatory measure, it revised and replaced the patchwork of common law and statutory rules that had governed police investigations. In doing so it conferred additional powers on the police and, as a *quid pro quo*, introduced mechanisms designed to balance the extension of police powers with procedures to safeguard the rights of citizens and to ensure police accountability.

Giving general effect to the recommendations of the RCCP relating to the detention, treatment and questioning of suspects, the Act also confers on the Home Secretary a power, to be exercised with the approval of Parliament, to issue Codes of Practice (COP).¹⁰⁶ Through the relevant COP, PACE places an obligation on custody officers, who must be an officer of at least the rank of sergeant and be independent of the investigation, to ensure that the provisions of the Act and COP are not contravened and that those held in their custody are informed of their rights.¹⁰⁷ These officers are, therefore, required to maintain a "custody record" containing all details relevant to the detention of suspects.¹⁰⁸

Regarding the recording of police-suspect encounters, the COP also provides that records of interviews should, so far as practicable, be made contemporaneously or as soon as possible after the interview and should constitute a full verbatim record or at least an accurate summary.¹⁰⁹

The Act is heavily reliant on internal police discipline to ensure compliance with the COP,¹¹⁰ however, it also provides that evidence *must*, as a matter of law, be excluded from trial if it has been obtained by oppression or in circumstances that would otherwise render it

¹⁰⁵ This Act empowers the Crown Prosecution Service to advise on pre-charge cases referred to them by the police; to assume control over criminal proceedings instituted by the police; and to discontinue those proceedings when it deems such action to be appropriate.

¹⁰⁶ PACE Act, 1984, s.66 which also governs the issuance of Codes relating to searches of premises, the identification of suspects and the power to stop and search. S.60 provides for Codes in respect of the tape-recording of custodial interviews.

¹⁰⁷ *Ibid.*, ss.36-39, 56, 58.

¹⁰⁸ *Ibid.*, s.39; COP paras.2.1, 2.3.

¹⁰⁹ COP para.11.

¹¹⁰ See PACE Act, 1984, s.67.

unreliable,¹¹¹ and gives judges a discretion to exclude it if its admission "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."¹¹²

It is clear that, in so far as they relate to custodial interrogations, the Act and its accompanying Codes seek to give broad effect to the proposals of the RCCP. By these provisions the pre-PACE position, under which the police acted as the sole, unmonitored and inadequately regulated narrators of what had transpired during the detention and questioning of suspects, has been recast by the introduction of measures for internal supervision, contemporaneous recording and for the strengthening of the rights of detainees. However, uncertainties persist over comprehensiveness, accuracy and reliability of interrogation records required by PACE particularly, though not exclusively, with respect to events that occur outside the formal custodial interview where the transmission to the courts of statements alleged to have been made by defendants continue to be reliant upon the generally unauthenticated accounts of police officers.

Thus, despite the advances it has made on the pre-PACE position, the regime erected by PACE continues to present difficulties both for any determination of the existence, form and effect of inducements to which defendants, as suspects, may have been subject and for any firm conclusions as to the integrity, accuracy and reliability of the record. Nevertheless, the interrogation records generated as a result of the reforms introduced by PACE make possible an assessment of the various ways in which actors involved in the interrogation process appear in those records. It also makes possible an examination of the nature of the police-suspect dynamic as it appears in those records. Finally, it enables comparisons to be made with images of the interrogation process derived from the pre-PACE era.

The Present Study

The PACE aspect of the present study was based upon a sample comprising the records of police interviews with detainees drawn from committal papers associated with 283 cases heard in a Crown Court following the implementation of PACE. An examination of the sample permitted the classification of the various ways in which interrogatees and the police were represented. It also admitted an assessment of the impact of the PACE reforms and

¹¹¹ *Ibid.*, s.76(2).

¹¹² *Ibid.*, s.78 (1) and see s.82 (3) which preserves the discretionary power of the court to exclude evidence.

facilitated an evaluation of the extent to which the images identified in the pre-PACE sample had resonances in the PACE sample.

Images of Detainees Under PACE

The examination of records of custodial interviews that formed the PACE element of the study identified the following typologies as characterising the great majority of defendants who, as suspected or accused persons, were detained and interrogated by the police. They are: (1) the unequivocally guilty; (2) the resolute; and (3) the evasive, artful and uncooperative.

1. Unequivocally Guilty Detainees

The unequivocally guilty frequently appeared in the survey as a class of individuals who, on being detained and interrogated, were recorded as exhibiting a preparedness not only to cooperate with the police but to confess to the offence for which they were being questioned. The survey found that while such persons evinced a general inclination to confess at the earliest opportunity, there were a number of individuals who appeared in the interrogation records to capitulate only on realising that their guilt was beyond dispute. As a class, therefore, the "unequivocally guilty" of the PACE era emerge as having similar qualities to their counterparts of the pre-PACE era.¹¹³

In **Case UP2009** two police officers, who were involved in a "drugs operation", observed D, who had parked her car outside a specified public house, to be engaged in a transaction with a "known drugs dealer". After the incident D was followed and, having parked her car, was approached by the police who searched her and recovered "a crystal-like substance". She was arrested and taken to the police station where a contemporaneously recorded interview was conducted.

PO: Do you require a solicitor to be present at the interview?

D: No because I'm pleading guilty.

PO: Can you tell me what this is?

¹¹³ See Chapter 9, above.

- D : Well, the officer said it was either cocaine or crack.
- PO: What do you believe it to be?
- D : I don't know, it's one of them.
- PO: Is it yours?
- D : Yes.
- PO: What were you going to do with it?
- D : I had it given to me to pass down to someone else on my way home.
- PO: Just to clarify, you obviously believe it to be either cocaine or crack, do realise that it is illegal for you to possess?
- D : Yes.
- PO: Do you realise as well that it's also an offence to give it to someone else?
- D : Well, as I've told you, I was asked to pass it to someone on my way home.
- PO: Clarifying it ... you weren't going to take it yourself?
- D : No. I wasn't taking it myself.

While D refused to state who she was going to give the substance to or from whom she had received it, she continued to profess her guilt.

- PO: The fact is [D], you are admitting you had got that on you to give to someone else.
- D : I'm admitting it was in my possession. I am pleading guilty to it. That's it.
- ...
- PO: ... was there any money involved?
- D : No. I'm saying that the cocaine or crack is mine and that's it.
- PO: But you intimated earlier you was going to pass that on to somebody else. Are you saying that's wrong now are you?
- D : No. I'm just saying it's mine. I'm taking the consequences alone.

The interview was concluded at this point. On the basis of this nine-minute exchange it would appear that D was concerned to have herself portrayed as a lesser actor in the incident that resulted in her arrest. She is also shown to be anxious to suffer alone the consequences of her actions, which she acknowledges were unlawful, with no intention of incriminating any of the other parties involved. Indeed, her attitude in interview might suggest a desire to secure early

release from the psychological pressures associated with arrest, detention and interrogation.¹¹⁴

The detainees in the following two cases appear in their interview records as rather more compliant confessors prepared to furnish their questioner, and thus external others, with sufficient information about their part in the offence and their own culpability as to render a determination of guilt by a court of law a virtual certainty.

The witness statements of two officers in **Case WP2114** detail that on receiving a report that a burglary of a dwelling house was in progress, the officers went to the specified address. During their search of the surrounding area, a pedestrian (D), who was said to answer the description of the suspect, was approached by the officers and, after having attempted to escape, was arrested. The formal interrogation of D at the police station was recorded by contemporaneously made notes. The notes document that after D had been informed of the reason for his arrest and cautioned, the interviewing officer asked:

PO: Am I correct in saying that you do not want a solicitor present at this interview?

D : Yes.¹¹⁵

PO: Did you go to [the site of the alleged burglary]?

D : Yes.

PO: Do you know who lives there?

D : No.

PO: Did you go inside?

D : Yes.

PO: How did you get in?

D : Through the back window.

PO: How did you open the window.

D : I forced it.

PO: Did the lock break?

D : Yeah.

PO: Why did you go into the house?

¹¹⁴ See Irving and Hilgendorf, 1880, pp.28-36; Walkley, 1987, pp.22, 26; Gudjonsson, 1992, pp.25-7.

¹¹⁵ There is no evidence within the documents that relate to the interrogation to suggest that D was expressly asked if he desired a legal adviser. Furthermore, the question and its reply provides some evidence for supposing that an informal and unrecorded exchange between the police and D had taken place prior to the commencement of the formal interview.

D : I found myself in need of some money and ended up trying to steal some.

PO: Did you steal anything inside the house?

D : No

PO: Why?

D : Because I didn't see anything of value.

...

PO: You realise it's against the law to break into people's houses with the intention of stealing?

D : Yes I do realise this but I found myself without an alternative.

...

PO: When you left the house where did you decide to go?

D : I don't know, just decided to walk the street in despair because I was unsuccessful.

PO: A policeman saw you in the street, is that correct?

D : Yes.

PO: What did you do when he saw you?

D : Panicked and ran.

...

PO: If there was something of value there would you have stolen it?

D : Yes.¹¹⁶

PO: Is there anything else you wish to say regarding this offence?

D : I would like to apologise for upsetting the person's house I broke into. It's just that lately I've been having trouble making ends meet.

¹¹⁶ As the police removed certain property, including jewellery, a camera, a video and other electrical goods from the house, it may be assumed that D, who claimed he "didn't see anything of value" intended to steal cash or other comparatively small items which he could easily exchange for cash. Thus, despite the serious nature of the offence, D may be regarded as a petty offender; indeed, it would seem that the police questioner considered him as such.

Certainly, D emerges from the interview as unequivocally guilty. However, he also appears as an honest and contrite confessor who accepts his criminal responsibility without quibble. Therefore, it is likely that both his repentant and mitigatory remarks would be relatively well received at the sentencing stage of his trial. This may be contrasted with those cases in which apparently guilty interrogatees contest the incontestable during their custodial interrogation only to submit a plea of guilty to the trial court.

In **Case UP2002**, the interrogation of D1 followed an incident which resulted in fire damage to an unoccupied dwelling house. According to the witness statement of the arresting officer on arriving at the home of the suspect, eight days after the incident, he asked:

- PO: Are you [Robin Redbreast]?
- D1: Yes. I've been waiting for you
- PO: Why is that?
- D1: The business about the fire.
- PO: Well, I have to arrest you on suspicion of arson.

After being cautioned D1 is reported to have said:

- D1: I'm not going to piss you about, I'll tell you exactly what happened. To think I'm in this shit for £30.

D1 was escorted to the police station where he was questioned in the absence of a legal adviser. The interrogation was recorded by contemporaneously made notes.

- PO: ... if you wish to have a solicitor present during this interview its a matter for yourself. Do you wish to have a solicitor present?
- D1: No.
- PO: I will inform you that [the mortgagee, D3] and [the co-accused, D2] have been arrested for the same offence and have been both charged. First of all, do you admit being responsible for setting fire to the premises?
- D1: Yes.

D1 was then asked and answered questions relating to his friendship with D2 and D3 and his meeting them in a public house on the evening of the incident.

PO: So when exactly did you discuss setting fire to the premises?

D1: As I was about to leave [the pub] with [D2], [D3] called me back and asked me if I would do a job for him.... He said he wanted his house burned down and when I asked why he said it was for insurance.... He said it would be worth £30 to me. I'd got no money so I agreed.... I told [D2] what [D3] had said and asked him if he wanted to help and have half the money. He agreed.

...

PO: Then what happened?

D1: We left the pub ... and got some petrol.

PO: Was that the petrol you used in the fire?

D1: Yeah.

PO: Who purchased the petrol?

D1: I did.

...

PO: What happened then?

D1: We went to [D3's] house ... and broke in.

PO: Did you know whether [D3] was at home at this time?

D1: Yes, he said he would be next door.

...

PO: Did you check to see if the gas and electric mains were switched off?

D1: No, I didn't think.

PO: How long were you in the house for?

D1: Five minutes at the most.

PO: Were you aware or concerned of the danger that could arise by setting fire to a dwelling house by means of petrol and the explosion you could have caused?

D1: I didn't think at the time.

For the remainder of the interview D1 was questioned as to his precise movements prior to, during and immediately after the incident. He appears to have cooperated fully with the police

in that his answers served not only to further incriminate himself but also D2 and D3. He may be seen throughout the interview as conveying an impression of a thoughtless, tractable and irresponsible figure whose actions were inspired by the prospect of financial gain. Nevertheless, this excerpt indicates that quite apart from the admissions of guilt formally recorded in the police station, unverifiable narrative accounts of dialogues said to have occurred outside the formal interview continue to have a role to play under the regime brought into operation by PACE.¹¹⁷

Case DP2213, the final case to be discussed within the present category, recounts that D1 and D2 were arrested and detained at the police station on suspicion of stealing a wallet from the changing room of a sports centre. According to the contemporaneously made interview notes only D2 was formally interrogated. The notes relate that he was interviewed twice, on both occasions in the absence of a legal adviser.¹¹⁸ The first interview, in which D2 seems cooperative in so far as he answers the questions put to him, is reported as having taken seventeen minutes. However, in the second interview, conducted an hour after the first and taking five minutes, D2 emerges as the offender who, having failed either to exculpate himself and therefore to incriminate D1 or to delude his questioner, comes to be reconciled with his own criminal responsibility. The two interviews are reproduced here:

- PO: You have been arrested on suspicion of theft of a wallet and its contents yesterday. Are you prepared to answer my questions?
- D2: Yes.
- PO: Today you went [to the bank] and exchanged a \$10 note for English currency. Where did you get that note from?
- D2: [D1].
- PO: When did he give you this note?
- D2: Last night.
- PO: Where were you when he gave it to you?
- D2: At [home]. I asked to borrow some money.
- PO: What did he say when he gave you this note?

¹¹⁷ The problem of how a meaningful waiver of the right to legal advice may be authenticated is also highlighted by this case. In this particular instance, it may be contended that the manner in which D1 was asked if he wish to have a solicitor present implied that he would have to arrange this for himself and be required to meet the costs incurred.

¹¹⁸ Indeed, the interrogation record indicates that at no point was D2 advised of his right to legal advice.

- D2: He just said you can have this if you want. I asked where he got it from and he said don't worry. That's the answer he gives to everything.
- PO: So by him saying that you suspected it was stolen?
- D2: Yes, I suspected it was stolen when he gave it me. I thought it was a lot of money. I had no idea of its true value.
- PO: So although you suspected it was stolen you still took it off him?
- D2: Yes.
- PO: When you cashed it today what were you going to do with the money?
- D2: Get some fags and that. Get something to eat.
- PO: Yesterday afternoon, what did you do?
- D2: ... We went to the gym. I got out at about three but [D1] stayed in. I was in the shower for about ten minutes then [D1] came out. I got dried and went out of the changing room. [D1] came out about two minutes later.
- PO: Did you see anybody else in the changing room?
- D2: A tall lad and an older man getting changed.
- PO: [The complainant] had his wallet stolen yesterday from the changing rooms at the sports centre at about the time you were in there. Did you steal his wallet?
- D2: No I didn't.
- PO: Did [D1] steal his wallet?
- D2: I don't know. He came out after me.
- PO: Amongst the property in the wallet was a \$10 note which I believe was the one you cashed this morning. Have you any comment?
- D2: I've told you what we done. I got the \$10 note off [D1] and cashed it. I don't know anything about a wallet.
- PO: To sum up, you say you accepted the \$10 note off [D1] believing it was stolen but you didn't actually steal the wallet or its contents?
- D2: Yes. I accepted the note having my own suspicions that it was stolen but I didn't take the wallet.

At this point the interview was terminated. On the basis of the two apparently contemporaneously recorded interviews, the demeanour of D2 in his second interview, in contrast to the first, may be attributed to his realisation that his story had failed to convince his interrogator.

PO: I have now had chance to speak to D1 and from what he tells me, I'll asked you once again, who stole that wallet?

D2: Me.

PO: Where did you steal it from?

D2: It was just there in the middle of a pile of clothes on a bench.

PO: Where were the pile of clothes?

D2: On a bench in the changing room.

PO: Where is the wallet now?

D2: ... in the river.

...

PO: What happened to the contents of the wallet?

D2: I took it out. Only the money. The rest was left in.

PO: So what money did you have out of it?

D2: Just a five pound note, a \$10 note and some brown coloured notes but I didn't know what they was.

PO: What did D1 have out of this?

D2: Just the ones I didn't know what they was.

PO: Was D1 with you when you stole the wallet?

D2: He was still getting changed.

PO: Why did you steal it?

D2: I don't know.

PO: Is there anything else you wish to tell me?

D2: Just sorry for messing you about, that's all.

Notwithstanding his expression of contrition - regarding his part in what he seemed to believe was a needlessly prolonged investigation, though not for the misdeed itself nor for his attempt to implicate D1 - D2 is shown not only to be guilty of the offence for which he was charged but also to be of a mendacious, calculating and disloyal character.

2. *Resolute Detainees*

This class of detainee, while under interrogation, commonly appear to be willing to cooperate with the police to the extent that they generally answer the questions that are put to them. However, irrespective of the issue of legal guilt, the following cases illustrate that such detainees may resolutely deny culpability in spite of the force of the questions asked by the police and the unfavourable connotations they often carry.

The following extract has been taken from **Case DP2108**. According to the witness statements of the arresting officers, they arrived at a specified block of flats to find D1 (the tenant of the flat they sought to search by authority of a warrant issued under the Misuse of Drugs Act, 1971) engaged in a conversation on the telephone situated in the foyer. It is reported that the police interrupted D1 and, after he had refused both to identify himself and to surrender the keys to the flat, arrested him and seized the keys. At this point D1 is reported to have "started to struggle violently". However, he was "eventually restrained and handcuffed." He was then conveyed to the police station where, in the presence of his legal adviser, a formal custodial interview was recorded by contemporaneously made notes.

The record details that D1 was informed by the police that a number of items were recovered from the flat. He was then asked to identify the persons present in the flat when the warrant was executed. This he did. As will be seen, the questions then put to D1 were largely directed towards linking him with the items found in the flat:

PO: When we executed the warrant the people in the flat initially refused us admittance.... Can you think of any reason why they would do that?

D1: I have got no idea.

PO: Thrown from the window was a lock-knife which had burn marks on the blade. Would that have been yours?

D1: No.

...

PO: There was also a piece of white tissue which contained a white rock-like substance which we have analysed and found to be cocaine. It is commonly known as crack. Was that yours?

D1: I've no idea about those things.

PO: Do you smoke cocaine?

D1: I don't touch the stuff.

...

PO: When we entered your flat it was quite obvious ... that cocaine had been or was being smoked. What do you know about this?

D1: I know nothing about this. I asked to be present when they were searching the flat but they refused.

PO: Has anyone ever snorted cocaine in your flat?

D1: I was hardly ever there so I wouldn't know....

...

PO: ... there were some items on the large table which included a small tube containing white powder ... and two small bags which appeared to contain the same white powder.... Is this yours?

D1: As I've said before, none of the stuff was mine.

PO: If it is just bicarbonate of soda would it be yours?

D1: ... I've just said none of the stuff is mine whether it be bicarbonate of soda or whatever.

PO: Do you know whose it is?

D1: I've got no idea.

...

PO: There was also a plastic bottle which contained water, had a foil top and a plastic tube inserted through the side. This commonly is used to inhale smoke, especially when snorting cocaine. Is this yours?

D1: I don't think to answer that. I've already said none of the stuff which is in there is mine.

PO: ... would you accept that the people in your flat were using them to inhale or take controlled drugs?

D1: Tell you the truth, I can't answer that because I weren't there.

...

PO: In my opinion, cocaine has been smoked in that flat for some time and I believe that you have knowledge of this. Is that true?

D1: No that's untrue.

PO: The bottles and other items, I assume, as you have no knowledge of them, would not have your fingerprints on them. Is that right?

D1: Yeah.

PO: Will you consent to give your fingerprints?

D1: Yes.

...

PO: Have you ever taken cocaine in any form?

D1: I've never tried it.

PO: But you are aware it can be smoked?

D1: Yeah.

PO: It was being smoked in your flat, is not that right?

D1: Not with my knowledge.

...

PO: I believe you ... have been supplying cocaine. Is that right?

D1: It's wrong.

PO: Why did you obstruct us in every way possible when you were arrested?

D1: You obstructed me by cutting my phone call off. I asked you why you wanted to know my name. You wouldn't tell me. So I told you I wouldn't tell you my name unless I knew what it was in aid of. I asked if I was being arrested. I was told, not at the moment.... I was then asked to turn my pockets out, which I did. One officer grabbed for my keys. I refused to let it go and then I was set upon by one of the officers kneeing me in the groin.... I was kicked and punched in the face....

...

PO: You knew exactly what was going to happen; we were going to execute a search warrant at your flat ... and you struggled and would not release your keys in an attempt to prevent us from executing the warrant.... Is that not the case?

- D1: How could it be the case when I wanted to be there when you searched the flat?
- PO: You also knew there were three men you flat....
- D1: Yes there were three other persons there.
- PO: And you knew that if we had your keys we would have let ourselves in and found them smoking cocaine.
- D1: You did have my keys. It weren't my concern if you caught them smoking cocaine.... I'm only concerned about myself.

It is clear from this extract that the persistence of the police questioner fails to elicit the incriminatory admissions sought after. D, on the other hand, is shown to be equally persistent in his claim that he was not involved in any wrongdoing. Indeed, the extract presents a picture of two protagonists competing to ensure their own version of the disputed events is ascendant in the interrogation record to be scrutinised by external others. A rather more striking feature of this and many other exchanges recorded within the PACE era, is the incidence of detainees who are recorded as having given their own account of the alleged offence. In the context of the present category, these accounts were often seen to run counter to that presented by the police. This may be contrasted with the bulk of the narrative accounts of interrogations studied from the pre-PACE era. It has been seen that these accounts generally depicted detainees as either cooperative malefactors who took an acquiescent stance in regard to police case theories or as individuals employing weak strategies in their attempts to evade criminal responsibility.

The ability of the interrogatee to both resist the assertions of his interrogator and to insist on his innocence is evident in the next case. Again this case is but one example of that class of detainee identified by the survey who resolutely deny guilt during interrogation.

The two witness statements made by the officers concerned with the attempted apprehension of a suspect in **Case WP2008** relate that "a large crowd of drunken young men" were seen "spilling out" of a public house. It was alleged that one of their number threw a glass smashing a window of the public house. The officers, both wearing uniform, attempted to arrest the individual they had identified as being responsible. The suspect (D) resisted the officers, one of whom had caught hold of him by his shirt. In the struggle the shirt "came from his body" into the hands of the officer. With the assistance of the "encircling mob" the suspect managed to free himself. It was alleged that in the ensuing melee the now shirtless suspect kicked one of the officers and ran off. D, who was found near to the scene, was arrested, taken

to the police station and there questioned in the presence of his legal adviser. The interview was recorded by contemporaneously made notes.

PO: In your own words would you tell us what happened when you left the public house and why you were detained by the officer?

D : ... I was going round the corner, there was a group of lads crossing the road ... then there was a scuffle and two police officers come. One of them grabbed hold of me and there was a struggle. We both went down on the floor ... the boots just started coming in while we were both on the floor.... I broke free, ran toward the bus stop and then the officer come and arrested me. I was handcuffed and brought here. That's it.

...

PO: Where's your shirt?

D : I don't know. In the road.

...

PO: Do you know why the officer detained you?

D : No.

PO: ... for throwing a bottle through the window of the public house. Did you cause that damage?

D : No.

...

PO: Why did you struggle with the officer?

D : What did he grab me for? I was approached from behind ... it's natural, you'd struggle anyway.

PO: But you knew it was a police officer didn't you?

D : Not at first....

PO: You knew there were two police officers there didn't you?

D : Not at first....

...

PO: When did you lose your shirt?

D : When the kicks started coming in. I struggled to get loose, the officer had hold of my shirt and it just come off.

PO: Were you the only person without a shirt?

D : Don't know. Didn't stop to look.

...

PO: You were seen by a number of witnesses without your shirt ... kicking the officer around the head. What have you to say to that?

D : I never kicked the officer in the head.

...

PO: The second officer ... the one who arrested you... confirms what went on. Is he lying when he says it was you who assaulted his colleague?

D : There was a large number of youths, any one of them could have assaulted the police officer.

PO: A number of them did and you were also seen assaulting the officer with them. Do you have anything to say to that?

D : They're mistaken.

PO: You were the only one without a shirt and you were seen by the witnesses kicking the officer.

D : Sorry, those witnesses must be mistaken.

...

PO: I can assure you [D], they did see what went on. Are you going to tell us the truth in respect of this incident?

D : I've told you the truth.

Despite further questions of a similar nature, D maintained that the witnesses were mistaken and that he was not a participant but a victim of the incident. Irrespective of whether he was indeed telling "the truth", it is apparent that D proved to be resistant both to the attempts made to manipulate him into challenging the integrity or authority of the arresting officer and to the efforts made by the questioner to extract damaging admissions from him.

The image of the suspect who, while under interrogation, persistently denies committing the offence for which he has been detained is again evident in **Case DP2177**.

In this case a quantity of cannabis resin was recovered by the police, who were engaged in a surveillance operation, from a vehicle carrying four persons after the occupants had been observed leaving a public house. The following is an excerpt from the contemporaneously recorded interrogation of the driver which was attended by his legal adviser.

- PO: As a result of you being stopped tonight your vehicle was searched and found in the ashtray ... were these two large pieces of resin. Is it yours?
- D : No.
- PO: There were three other people in the van with you.... Does it belong to them?
- D : I don't know who it belongs to.
- PO: What do you recognise it to be?
- D : I don't recognise it to be anything.

D was then asked to account for his movements before journeying into the district in which he was arrested that night. After he had answered the questioner stated:

- PO: Why travel twenty-five miles or so to a reputable drug dealing public house ... to go for a drink when you could have stayed [where you were]?
- D : Bit boring.
- ...
- PO: It appears to us that you collected your friends ... and went to the pub ... with the sole intention of buying the cannabis because your reasons for going are weak to say the least. Would you comment on that?
- D : I can't really comment. Why weak?
- PO: I believe you were the subject of a stop and search a few months ago?
- D : True.
- PO: What was found on you?
- D : A very small quantity of cannabis.
- PO: Cannabis resin?
- D : Yes.

- PO: So what is that?
- D : I don't recognise it....
- PO: So cannabis has changed its appearance has it?
- D : No. I only got caught with a small amount. Nothing like that.
- PO: There's no problem with the quantity. What do you believe it to be?
- D : I don't know. Cannabis is usually black.
- PO: The reason you are avoiding the question is you know that that amount is a dealing amount and you are up to your neck in it.
- D : No, it's nothing at all like that.
- PO: This cannabis resin must belong to you or your friends, surely you can see that?
- D : Fair comment.
- PO: So whose is it?
- D : Ask the other three.
- PO: ... I am specifically asking you because; one, its your vehicle; two, you were driving; three, you were seen to drive off from the pub with a coloured man.
- D : It is my vehicle. I do drive it. What if it had been a Chinese man?
- PO: We know from experience that coloured men in [this vicinity] are notorious for dealing drugs. Do you agree?
- D : I don't know.... It's nothing to do with me.
- PO: You do realise the serious nature of this offence?
- D : Yes.
- PO: Perhaps that's why you are so evasive....

Soon after this point, with D continuing to deny being involved, the interview was concluded. Nevertheless, it would seem that he failed to adequately dispel the suspicion under which he was held.

Case UP2026 is the final case excerpted in the present category as an example of an interrogation record in which a detainee under interrogation resolutely denies the offence in spite of the seemingly clear incriminatory evidence presented to him by the police.

Suspecting two men of perpetrating a burglary, a neighbour telephoned the police who arrived at the private address to discover D1 leaving the dwelling house by a window. D1 was arrested and later interviewed at the police station where he confessed to the offence and implicated D2. Presently, D2, who had been found outside the premises when the police arrived - in what was suggested by the arresting officers to be a state of inebriation - was also

conveyed to the police station and there questioned as to his involvement. The interview was recorded contemporaneously and in the absence of a legal adviser.

PO: ... I wish to question you about the burglary ... for which you were arrested earlier. [The caution.]
Do you understand?

D2: Yes.

PO: Do you know [D1]?

D2: Yes.

...

PO: Did you come to [the town centre] with him today?

D2: No. I met him.

PO: Did you have a drink with him in [a specified public house]?

D2: There were a few of us in the pub.

PO: Did you leave the pub with [D1]?

D2: Yes. Four of us there was. Outside the pub there's a patio thing ... with a bench. [D1] said he wanted to go and see a friend who lives nearby. I was sitting on the bench having a drink with [named others], we finished the drink, [the others] went. D1 hadn't come back so I walked across the road, round the side of a block of flats and on the floor there was two bottles of whisky and D1 was inside.... I thought he was inside his mate's flat.... I turned round to go to the front of the flat and I bumped into a copper.

...

PO: Whose was the whisky?

D2: I don't know. It was outside on the floor.

PO: You didn't see how it got there?

D2: No.

PO: Did you know that [D1] had broken into the flat and was in the process of stealing?

D2: No. I thought he was in his mate's flat.

PO: What would you have done with the whisky had the police not come?

D2: Drunk it.

At this point the interview was brought to an end; some ninety minutes later it was resumed.

- PO: It would appear that what you told me is not quite correct. I understand having spoken to D1 that he handed the items to you out of the window. Is that true?
- D2: No.
- PO: He told you he was going to burgle a place didn't he?
- D2: No.
- PO: And you followed him over to the flat didn't you?
- D2: Yes. I was with [the others] sitting on a bench. When that was finished, [D1] hadn't come back so I walked over there.
- PO: And [D1] handed the items to you didn't he.
- D2: He handed nothing to me. I walked round the corner ... the whisky was on the floor and I picked it up.
- PO: A witness saw the items being handed over from someone in the flat to someone outside the flat. The one outside was you.... Isn't that what happened?
- D2: No.

The study found that of those detainees who fell into the present class few had been interrogated in the absence of a legal adviser. This case is offered as one example of those unrepresented interrogatees who stoutly deny being involved in the alleged offence in spite of the seemingly strong evidence that connects them to it. Irrespective of whether such denials were sincere, the survey found it uncommon for unrepresented individuals to display such perseverance in the face of hostile questioning designed to secure incriminatory admissions.

3. Evasive, Artful and Otherwise Uncooperative Detainees

Aside from those detainees who appeared to fall within the classes previously discussed, the study generated a third category involving a significant proportion of detainees. Broadly, as the following examples will illustrate, these detainees were recorded as adopting, with varying degrees of sophistication, either evasive, artful or generally uncooperative stances during their interrogation.

In **Case UP2027** it is reported that D had aroused the suspicions of two police officers when he was found to be breathing heavily and perspiring in the vicinity of a recently perpetrated

robbery. According to the witness statement of the officers, D was arrested after they confronted him in the street and asked:

PO: Where have you just come from?

D : From the snooker club.

PO: Where?

D : [Sesame Street]

PO: You fit the general description of a man who has just committed a robbery [in that area] and has been chased in this general direction. I am arresting you on suspicion of committing this offence.

D : I've been at the snooker club.

The formal interrogation of D, held at the police station was attended by his legal adviser and recorded by contemporaneously made notes. The notes record that following the administration of the caution, D was asked:

PO: What have you got to say about the incident?

D : I don't know anything in regards to any robbery and I don't want to answer any particular questions to police officers.

Following this remark and in spite of the number of wide ranging questions put to him by the police, it will be seen that D obdurately refused to answer.

PO: Are you a married or single man?

D : No comment.

PO: You live at [Coronation Street]?

D : No comment.

PO: How long have you lived at that address?

D : No comment.

PO: Have you got any children?

D : No comment.

PO: Can you account for your movements this morning?

D : No comment.

...

PO: Is [Coronation Street] your fixed address?
D : No comment.
PO: Would you like a cigarette?
D : No comment.
PO: Were you responsible for this offence of robbery?
D : No comment.
PO: By making no comment you are not denying or admitting the offence.
D : No comment.
PO: When you were arrested ... you stated that you had just come from the snooker club. Is that correct?
D : No comment.
PO: Why are you making no comment?
D : No comment.
PO: Is it on the advice of your solicitor?
D : No comment.
PO: By me asking the questions I'm giving you the opportunity to account for your movements.... By you answering it would be possible for us to prove or disprove your involvement. Would you agree?
D : No comment.

...

PO: ... from your answers I can assume that your are not denying the offence.
D : No comment.
PO: Do you agree that when you were arrested you said you had come from the snooker club?
D : No comment.
PO: How would you describe the weather today?
D : No comment.
PO: When you were arrested you stated you were of no fixed address. Is that correct?¹¹⁹
D : No comment.
PO: ... which is true, you are of no fixed address or you live at [Coronation Street]?
D : No comment.

¹¹⁹ There is no record within the relevant documents of D having made such a statement.

PO: Surely you can answer that?

D : No comment.

PO: It's not directly to do with this offence. It's purely for records.

D : No comment.

...

PO: I'm giving you every opportunity to answer questions. Why do you choose not to?

D : No comment.

PO: By making no comment it indicates to me that you are responsible for this offence.

D : No comment.

PO: Would you agree your actions are not those of an innocent man?

D : No comment.

The interview is recorded as having continued in this manner until it was finally abandoned. Whilst being subject to a variety of questions ranging from the ostensibly innocuous to the directly accusatory, all specifically designed to gain a response, D is shown to possess considerable fortitude in maintaining a "no comment" stance for the duration of the interview.

The scope the contemporaneously recorded interrogation provides for external others to draw inferences unfavourable to the interests of the accused who declines to answer the reasonable questions put to him by those commissioned to investigate crime is also evident in the following case. However, as was seen in the case above, these records also provide for the documentation of some of the various "legal" strategies that might be employed to undermine the exercise of the right to silence.

In **Case DP2061** officers were directed to a commercial premises where intruders were reported to be engaged in burglarious activities. It is reported by the officers that whilst searching the surrounding area D was seen to be running. The officers called for him to stop and lie on the floor. D complied. He was then arrested and taken into custody. The formal interview, attended by the duty solicitor, was recorded by contemporaneously made notes.

PO: ... since your arrest ... we have made enquiries with witnesses to the incident. Before I reveal what they have said I am giving you the opportunity to explain your actions. Have you any explanation?

D : Sorry, I don't wish to say anything.

PO: Witnesses have related to us that you ... were seen [acting suspiciously]. And you were chased [before] being apprehended by myself. Is that correct?

D : Sorry, I don't wish to say anything.

PO: Can you explain the screwdriver and saw blade which were on your person at the time of your arrest? What were they for?

D : Sorry, I don't wish to say anything.

...

PO: Is that as far as we are going to get? Are you going to explain anything about the incident at all?

D : Sorry, I don't wish to say anything.

PO: Will you read these notes and tell me if you wish to add or alter anything?

D : Sorry, I can't read your writing.

The notes were read over to D by the duty solicitor.

PO: Are they alright?

D : Yes.

The notes were signed and the twenty-minute interview abandoned. Some fourteen hours later a second interview was convened. On this occasion no legal adviser attended.

PO: Right [D], you know who I am. This is detective sergeant [P], he is also from the CID.... I know you've been interviewed during the night about why you've been arrested ... you chose not to answer any questions, is that right?

D : Sorry, I don't wish to say anything.

PO: I would like to point out that the reason we want to interview you is to see if you can offer any reasonable explanation about the incident last night. Do you understand that?

D : Sorry, I don't wish to say anything.

PO: If you haven't done anything wrong and you can offer an explanation ... it would prevent you from appearing in court. If you haven't done anything wrong and can prove that to us, now is the time to tell us. Do you appreciate that?

D : Sorry, I don't have anything to say.

...

- PO: Right [D], I have written down everything you have said and I have noted you keep saying "sorry".
As I see it you have nothing to be "sorry" for. If you're innocent ... tell us so.
- D : Sorry, I don't wish to say anything at this time.

The study found that detainees infrequently exercised their right to silence in this manner. When it is considered that in spite of the words of the caution, strong social and psychological pressures to answer questions operate upon interrogatees,¹²⁰ particularly in the "inherently coercive" atmosphere of a police station,¹²¹ and that interrogatees are liable to have adverse inference drawn from their failure to explain themselves to their questioner,¹²² this feature of the study should not be surprising.

The previously discussed incident which gave rise to the custodial interrogation of D1 in **Case DP2108**¹²³ also resulted in the arrest and interrogation of the three individuals present in the flat when the police arrived to execute the search warrant issued under the Misuse of Drugs Act, 1971. The contemporaneously made notes recording the interview with one of the individuals (D2), conveys the impression that he employed a general strategy of non-compliance which was interpreted by a somewhat irritated officer as indifference. The following extract is drawn from the interview which, according to the record, was attended by a "solicitor's representative".

- PO: You were arrested, following the execution of a search warrant, for being in possession of controlled drugs, namely cocaine and cannabis. Do you understand that?
- D2: No.
- PO: Where do you live?
- D2: I told you before.

¹²⁰ See Driver, 1968, pp.42-61; Irving, 1980, p.103; Softley, 1980, pp.73-4; RCCP, *Report*, 1981, paras.4.46, 4.73.

¹²¹ See Commerton, 1964, p.179. See also Biderman, 1960, pp.120-47; *Miranda v. Arizona* (1966) 348 US 436, pp.456-8, 467-8, 478-9; Griffiths and Ayres (1967) 300-19; Irving, 1980, p.153; Inman, 1981 p.476.

¹²² See Criminal Law Revision Committee, 1972, *supra.*, n.5, para.37; Greenawalt, 1974, pp.236-46. See also *Sullivan* (1966) 51 Cr.App.R. 102; and *Gilbert* (1977) 66 Cr.App.R. 237; RCCP, *Report*, para.4.39.

¹²³ *Supra.* pp.309-12.

PO: Why were you in that flat?

The interview notes report that at this point D "looked away" from the interviewing officers.

PO: [D2], are you listening?

It is recorded that D2 "nodded".

PO: Do you wish to answer the question? Why were you in the flat?

D2: [D made no reply.]

PO: Whose flat is it?

It is stated that D2 "closed his eyes".

PO: Sit up straight and turn round.

D2: Am I bothering you?

PO: Yes sit up straight and turn around please.

The notes record that D2 began to turn and face the officers.

PO: Who is [D1]?

D2: Who is [D1]?

PO: Yes.

D2: [Made no reply]

PO: Who were you with in the flat?

D2: I was there by myself. I don't know who was there.

...

PO: When the police arrived you were sitting at the table. What were you doing?

It is reported that D2 "shut his eyes".

PO: Do you wish to answer that question?

- D2: No.
- PO: Do you agree that you were sitting at a table when we entered the flat?
- D2: I don't agree.
- PO: Where were you?
- D2: I was lying down on a bed.
- PO: Do you agree that there were two other persons in the flat?
- D2: ... I don't know who was in the flat. I was lying down on the bed with my eyes closed.

The interview continued in this manner until it was finally brought to an end by the police. On the basis of this extract and from the point of view of a prosecution, it may be argued that just as silence in the face of police questions may invite damaging inferences to be drawn, so the apparent failure of D2 to mount anything more than a grudging and uninspired attempt to contest the allegations put to him by the police may also invite inferences denotative of guilt. This is reinforced by the consideration that he appears to exhibit a disdainful attitude in respect of the police and their investigations.

The final case excerpted under the present head illustrates that even when evasive, artful or uncooperative, although the interrogatee may frustrate police attempts to induce incriminatory replies to the precise questions asked, this may not preclude the instituting of proceedings. This case would suggest that should a detainee employ such strategies he should be reminded that the effect on those who will ultimately determine the issue may not be entirely favourable.

According to the witness statements of the arresting officers in **Case WP2153**, the suspect (D1), who had been followed into the public toilets by the officers, was seen to be looking under the partitions of the cubicles. The occupant of one of the cubicles (D2) was regarded by the officers as suspicious. As he left the cubicle, carrying toilet paper with writing upon it, one of the officers approached him and reportedly said:

- PO: You have been in the toilet for the past three quarters of an hour and your actions have been observed, therefore, I am arresting you on suspicion of attempting to procure an act of gross indecency.
- D2: I knew it was the police.... Why do you persecute us?

While D2 was being detained one of the officers knocked on the cubicle of the door occupied by D1.

- PO: This is the police, open this door immediately.
- D1: What's going on...?
- PO: I shall be forced to kick this door open if you don't open it now.
- D1: OK. OK.

D1 and D2 were taken into custody and questioned. During his interrogation D1 confessed to contravening section 32 of the Sexual Offences Act, 1956.¹²⁴ However, he denied having known or communicated with D2. Later, in the absence of a legal advisor, D2 was interviewed. It will be seen from the following extract that the strategy adopted by D2 during his interrogation was one which may be characterised as being based upon qualified cooperation.

- PO: Do you understand why you were arrested?
- D2: Not particularly.
- PO: You were arrested on attempting to procure an act of gross indecency.
- D2: Can you explain what an act of gross indecency is?
- PO: Acts of masturbation in a public place, oral sex, buggery etc. Now do you understand?
- D2: Yes.
- PO: Why did you go to the toilets?
- D2: I went to the toilets, one, in the full knowledge that it was known to be a cottage.
- PO: What is a cottage?
- D2: A cottage is a place ... for gay men to find affection.
- PO: Are you gay?
- D2: Yes. I am gay.
- PO: Continue with your previous answer.
- D2: Two, to have a shit and, three, to see what was happening in terms of gay culture in the [area]. Four, to make notes about my past experiences when I was very young in that toilet and others that have been pulled down.
- PO: Did you go there to find a man to have sex with?
- D2: Not necessarily. It was only a possibility because that was an occurrence of that particular toilet.

¹²⁴ Which provides that "[i]t is an offence for a man persistently to solicit or importune in a public place for immoral purposes."

- PO: So if the opportunity arose you would have participated in sexual activity with another man?
- D2: No, not with anyone I did not like. Not in such a dangerous situation and definitely not because I've got a boyfriend and there is also the risk of infection of sexually transmitted diseases which I wouldn't like to pass on to anyone.
- PO: You said, "not necessarily for sex it was only a possibility". So presuming it was someone you liked would you then have had sex or possibly gone somewhere with that person?
- D2: That's a leading question and I'm not answering it.
- PO: Can you give a direct answer as to your intentions?
- D2: My intentions are to document behaviour and events in the toilets that I was arrested in for use as creative material for either a book or as a part of a documentary of small town England and its insular behaviour.
- PO: Is it possible that if the opportunity arose in the toilets you would have had sex with a man?
- D2: No.
- PO: You said earlier, "not necessarily" that means to me possibly yes possibly no. So it was possible wasn't it?
- D2: Anything is possible.
- PO: During your time in the cubicle what were your actions?
- D2: I sat on the toilet ... I noticed someone lying on the floor ... I did not pay any attention as things like that don't bother me. Then I heard another door ... and the sound of chinking chains. I suspected it was the police ... I got frightened and began to take notes of what was happening, which the police are holding as evidence. Then my suspicions were confirmed....

D2 appears in the interrogation record as a rational and articulate interrogatee, one who is fully conscious of the object of the questions put to him and alert to police interrogation techniques. However, from the perspective of the prosecution, he also appears to cooperate with the police only to the extent that he is willing to expound upon answers that have little prospect of directly implicating him in the offence for which he has been arrested. Therefore, although he seems to face the repeated attempts to obtain incriminatory admissions from him with composure, this may be construed by jurors as elusiveness and, therefore, as evidence of guilt.

Conclusion

This chapter began with a summary of the process through which custodial interrogations by the police, formerly the subject of judge-made rules, came to be regulated by statute. It gave a brief account of the law enshrined in the PACE legislation before discussing a number of interrogation records generated in the period following the introduction of Act and its Codes of Practice. The records were assessed in order to isolate some of the images they contain with respect to suspects who were detained and interrogated by the police and whose cases were determined in the Crown Court. The images gleaned from these records will, in chapter 13, be considered with reference to those produced in the pre-PACE era. However, first it is necessary to evaluate the images contained in the PACE records respecting both the police and their interrogation methods.

CUSTODIAL INTERROGATIONS UNDER THE PACE REGIME: IMAGES OF THE POLICE AND POLICE QUESTIONING

Introduction

The preceding chapter, in its assessment of interview records generated since the implementation of the PACE reforms, advanced a number of typologies and, within those typologies, discussed a selection of cases which characterised the vast majority of defendants as they appeared in the contemporaneously made interview records studied, when detained as suspects and interrogated by the police. Drawing on that sample of interview records, the present chapter will assess the images those records contain relating to the police and to police investigative practices in the post-1986 prosecution process.

It must, however, be acknowledged that of themselves these records - quite apart from questions as to their internal exactness, fidelity and reliability - cannot provide a comprehensive picture either of police interrogations or of police investigations since those cases that did not proceed to trial in the Crown Court were expressly excluded from the study. Circumstances in which detainees were suspected and interviewed by the police but were not prosecuted were also excluded from the study.²¹

Although restricted to those cases which resulted in prosecution to Crown Court trial the study will provide a valuable insight into the functions of custodial interrogations, the nature of police-suspect relations as represented in interview records and the investigative techniques employed by police investigators, based upon the very material which frequently plays a key role in cases assembled for prosecution and determined by the courts.²²

McConville and Baldwin, in their pre-PACE empirical study, found that in addition to obtaining confessions police interrogations served a variety of collateral purposes ranging from the recovery of stolen property, clearing police books of unsolved crimes and the

²¹ As the records studied were concerned only with cases determined in the Crown Court, those individuals whose cases were determined at summary trial together with those who as a result of their custodial interviews succeeded in convincing the police of their innocence were also, necessarily, excluded. Also excluded were those individuals against whom no further action was taken or were cautioned by the police.

For a discussion of the cautioning process since the introduction of PACE, its essentially inquisitorial nature and its utility for the police, see Sanders, 1988, pp.513-32; McConville *et al.*, 1991, pp.77-8, 81-3, 101-5; Evans, 1993, pp.2-3.

²² See McConville *et al.*, 1991, pp.57, 65-76.

clarification of knowledge possessed by the police, to obtaining evidence against alleged accomplices, exonerating the innocent and, finally, to reinforce partial or subjective perceptions and to communicate stereotyped images that work to establish a firm normative dichotomy between law enforcers on the one hand and law breakers on the other.²³

The extent to which such findings may be shown to have validity in the wider post-1986 prosecution process is circumscribed by the consideration that the overriding impression gained from the present study is that police interrogations are, on the whole, directed towards gaining evidence to be used against suspects at trial. This was so even in those cases where it appeared that an admission was not vital to securing a conviction.²⁴ Certainly, it is generally understood that for the police the primary purpose for conducting custodial interrogations with persons suspected of involvement in crime is to secure admissions or confessions.²⁵

During the course of the present study it became clear that in their efforts to obtain confessions, admissions or other evidence that might be used against suspects, police interrogators frequently made use of a variety of persuasive and manipulative tactics. Applied with varying degrees of sophistication, these tactics generally centred upon the manipulation of information allegedly or actually possessed by the police; pointing out the advantages for the suspect in cooperating or confessing; manipulating the self-esteem of the suspect; and adopting a confrontational approach towards the suspect.²⁶

²³ McConville and Baldwin, 1981, pp.102-3, 141-4, 153-8. See also Inbau and Reid, 1962, p.208; McConville and Baldwin, 1982b, pp.165-75. And see Irving, 1980, pp.114-16.

²⁴ In their more recent empirical study McConville *et al.*, (1991, p.75) show that in addition to simply obtaining admissions from suspects, occasionally the police may have an interest in conducting interrogations to elicit information that may cast a favourable light upon the behaviour or character of persons believed to be guilty. (See also McConville and Hodgson, 1993, pp.111-14.) In other words, an interrogation may be "successful" in police terms where it does not involve an admission.

²⁵ See Irving, 1980, pp.114-16; Morris, 1980, p.10; Softley, 1980, pp.85-88; McConville and Baldwin, 1981, pp.110-14, 139; McConville and Baldwin, 1982, pp.165, 170-74; Dixon, 1991, p.244; McConville *et al.*, 1991, pp.57, 67, 76-77; Evans, 1993, pp.1-2, 47-8; McConville, 1993, pp.29-33, 39-45; McConville and Hodgson, 1993, pp.111-16.

For a forceful refutation of the assumption that confessions elicited from suspects during interrogation are vital for successful prosecutions see McConville and Baldwin, 1980, pp.993-5; McConville and Baldwin, 1981, pp.132-40; McConville, 1993, pp.83-88. See also Irving and McKenzie (1987, pp.4-22 and 1989, pp.145-50) who report a shift away from confessions as the main purpose for conducting interrogations to, as a result of PACE, an increased use of interrogations as a means of obtaining additional evidence.

²⁶ These and other such tactics are documented in the largely American police science literature, see, for example, Inbau and Reid, 1962; Aubry and Caputo, 1965; O'Hara, 1956; Royal and Schutt, 1976; see also Firth, 1976, p.1507; Walkley, 1987. The tactics espoused in these works, together with other tactics utilised by the police when questioning suspects, are discussed by Irving and Hilgendorf, 1980, pp.18-26, 39-41; Irving, 1980,

As other researchers have pointed out, such tactics which place reliance upon styles of questioning that "overtly manipulate the suspect's decision making"²⁷ may be productive of reliable as well unreliable confessions.²⁸

The interview records examined during the present research suggested the following question-forms were commonly used by investigating officers²⁹:

- *establishment questions*; these aim to establish a non-hostile relationship with the suspect to put him/her at ease, or off guard, and to "create an atmosphere in which cooperation is more likely."³⁰
- *general information-seeking questions*; this form of question is normally non-confrontational in character and is "designed to elicit the suspect's own story".³¹
- *offence focused information questions*; such questions focus directly on a particular offence and are designed to elicit direct answers from the suspect. An example might be: "OK, you know why you've been arrested don't you, what do you have to say about [the incident]?"³²
- *leading questions*; these are fashioned to persuade the suspect to give particular answers by foreclosing other possible answers (e.g: "You deliberately kicked him while he was on the ground didn't you?"; "The truth is you left the shop knowing the goods were in your bag and with no intention of paying for them, Isn't that right?").³³

pp.138-151; Morris, 1980, pp.18-19; Irving and McKenzie, 1989, pp.17-25; McConville *et al.*, 1991, pp.68-76; Evans, 1993, pp.4-6, 31-38; McConville and Hodgson, 1993, pp.119-53.

²⁷ McConville *et al.*, 1991, p.69.

²⁸ Inman, 1981, pp.476-79; Gudjonsson and Clark, 1986, pp.83-104; Gudjonsson and MacKeith, 1988, pp.191-94; McConville *et al.*, 1991, pp.66-69.

²⁹ The question-forms highlighted here draw on and extend those identified by McConville *et al.*, 1991, pp.69-70 and McConville and Hodgson, 1993, pp.137-40 whose analysis builds upon the work of Gudjonsson and MacKeith, 1990, pp.187-94.

³⁰ McConville and Hodgson, 1993, p.137. The authors offer the following as examples: "How many family do you have?"; "How long have you lived on the caravan site?"

³¹ McConville *et al.*, 1991, p.70. See also McConville and Hodgson, 1993, p.137.

³² See McConville and Hodgson, 1993, p.137.

³³ See Marquis *et al.*, 1972, pp.167-186; Lipton, 1977, pp.90-95; Powers *et al.*, 1979, pp.399-347; Cahill and Mingay, 1986, pp.212-224; McConville *et al.*, 1991, p.69; McConville and Hodgson, 1993, p.137.

- *statement questions*; these have been described as "statements which masquerade as questions" and are used to confront the suspect with a statement of fact which s/he is invited to confirm or contradict.³⁴
- *questions seeking the view or opinion of the suspect*; these questions purport to solicit the suspect's own view or opinion. However, they are generally directive or leading in nature in that they invite the suspect to accept a proposition contained in the question posed (e.g: "The fire must have been started deliberately, don't you agree?").
- *questions attributing a view or opinion to the suspect*; in effect these questions seek to force the suspect to adopt a police opinion. The police questioner, therefore, may reinterpret or paraphrase a statement made by the suspect in an effort to gain the suspect's assent to its reformulation. Alternatively the questioner may make a statement or offer an opinion carrying legal or evidential implications which the suspect is persuaded to accept, (e.g: "Are you asking us to believe....").³⁵
- *questions seeking an explanation for apparently incriminating evidence*; such questions are used by the police to confront the suspect with evidence which appears to incriminate them and, without adverting to any specific offence, ask for an explanation, (e.g: "You were arrested after having been found running away from an abandoned car which has been reported stolen. What have you to say for yourself?").³⁶
- *questions imputing involvement based on evidence*; through this form of question the police directly accuse the suspect of an offence on the basis of evidence which is disclosed to the suspect (e.g: "Look, the statement made by [X], the property recovered and the finger prints found, all point to your involvement don't they?").
- *accusatory questions*; here the police directly accuse the suspect of involvement in the offence in a manner similar to the "imputing involvement" question-form. However, in this form the accusation may not be supported by evidence or that evidence may not be disclosed to the suspect (e.g: "You're lying. We know a lot more about this than you think. You're responsible for this crime aren't you?"; "Look, we have a witness who can confirm that you were the driver. So let's have the truth. You and [Y] did this together didn't you?").

³⁴ McConville *et al.*, 1991, p.69. See also McConville and Hodgson, 1993, p.138.

³⁵ See McConville and Hodgson, 1993, p.138.

³⁶ *Ibid.*

- *legal closure questions*; these are questions that are phrased in legally significant terms in an attempt to force the suspect to adopt them in his/her replies.³⁷

A quantitative analysis of the frequency with which the question forms described appeared in both the pre-PACE and PACE interrogation records examined will be presented in the following chapter. At this stage, however, it may be observed that the use of the more invasive and manipulative of these question-styles appeared in the present study to be particularly evident in cases where suspected detainees did not readily comply with the police agenda or admit to the offence for which they were detained and questioned. Conversely, the use of simple information-seeking or neutral questions appeared to have been confined to those suspects who seemed willing to cooperate with the police.

It is worth noting that researchers have drawn attention to other factors that influence the decision making of detained suspects and the approach employed by the police in their questioning of them. Such situational and contextual factors include: the age and sex of the detained suspect; their criminal history; their previous contacts with the police; the nature of the alleged offence; the nature and strength of suspicions harboured against the suspect; police perceptions of the seriousness of the alleged offence; the cogency of the evidence available to the police when questioning the suspect (whether that evidence be "real evidence", the product of civilian or police witness statements, or in documentary form); the offence type; the presence of a legal adviser in the interview; and the length of detention.³⁸

Though clearly relevant, an exhaustive evaluation of the role played by each of the potentially identifiable variables was beyond the scope of the present research since the sample did not yield sufficient information to enable a consistent and reliable estimation of, for example, the strength of the available evidence, the police view of the seriousness of the alleged offence or whether the suspect had previous contacts with the police, irrespective of any previous convictions. However, those factors which proved to be consistently traceable,

³⁷ See McConville *et al.*, 1991, p.70; McConville and Hodgson, 1993, p.138. The latter give the following example: "So you stole the goods?" They point out that here, where it is common ground that the suspect took the goods out of the shop without paying for them, the suspect is invited to accept guilt, even though constituent elements of the crime (intention and dishonesty) have not been established.

³⁸ For an overview and assessment of the research into the operation of such factors see Evans (1993, pp.11-24) who builds on earlier research in his analysis of the factors that have been identified as having a bearing on admissions or denials made during police interviews with suspects. And for a discussion of the specifically psychological factors relevant to suspects' decision making during interrogation see Gudjonsson and MacKeith, 1988, pp.187-94.

such as the sex of the suspect, offence type and presence of legal adviser, are also discussed in the next chapter.

That said, the sample of committal papers associated with 285 cases, all of which were determined in the Crown Court following the introduction of PACE and its attendant Codes of Practice, gave rise to the formulation of four typologies or models which together incorporate the overwhelming majority of interrogation records studied. The four typologies (which are not proposed as alternatives since, to some extent, they overlap with each other) categorise the approach taken by police investigators during interrogations as: (1) to receive voluntarily given confessions; (2) to confront detainees with apparently incriminating evidence; (3) to weaken the resolve of detainees; (4) and to test or confirm police case theories. Although the categories will provide for an evaluation of the various tactics routinely employed by the police in their interactions with detainees, they will also serve as tools with which to assess the images the interrogation records contain of policing, the police role in the investigative process and police attitudes to that role as voiced by the police themselves.

Images of the Police and the Investigative Process Under PACE

1. Interrogations for the reception of voluntarily given confessions

The first category of images derived from the interrogation records embraces that comparatively small number of recorded interviews in which the police appeared to exert little or no influence over the detainees they questioned. Such cases appeared in sharp contrast to the large majority of cases examined in that, investigating officers seemed to adopt a relatively passive role during interrogation, to rely chiefly upon the use of offence focused information questions and to leave the detainee free to tender his own uncoerced account. The following two cases are offered as examples:

The witness statement of the arresting officer in **Case RN2222** recounts that while on uniform patrol in the early hours of the morning he saw D standing in the doorway of a retail shop. D was approached and reportedly asked:

PO: What are you doing?

D : Walking to [Princethorpe].

- PO: By standing in a doorway?
- D : I suppose not.
- PO: Have you anything in your pockets you shouldn't?
- D : No, go on search me.

On searching D the officer recovered and took possession of a kitchen knife. It is reported that he then asked:

- PO: What have you got this for?
- D : Self defence. Why?
- PO: Would you use it if you were set upon?
- D : Yes, no problem. I've been beaten up twice before.
- PO: Have you any ID?
- D : No.
- PO: In that case I am arresting you for carrying an offensive weapon.

D was conveyed to the police station where he was interviewed by the arresting officer while a second officer recorded the interview by way of contemporaneously made notes. The ten-minute interview is recorded as follows:

- PO: You have been arrested earlier this morning carrying an offensive weapon and a plastic carrier bag. I wish to ask you some questions regarding your arrest. Do you wish to have a solicitor present whilst I do so?
- D : No.
- PO: Can you tell us why you were in a doorway in [Main Street] at 4 a.m. this morning with a knife and a carrier bag?
- D : I was going to wait till the police vehicle passed. I was then going to attempt to steal food or money, which ever was available, for me and the girl I'm living with.
- PO: Why?
- D : Because we spent all our money over Christmas. She relies on me for her money.
- PO: Where were you going to get the food or money from?
- D : Any shop, nowhere in particular.
- PO: What was the knife for?
- D : If there was any boxes there I could get into them with the knife and the bag to carry the stuff away.

...

PO: Have you stolen anything this morning?

D : No, nothing at all. I was arrested before I got the chance.

PO: Have you committed any other offences you want to tell us about?

D : No I haven't committed any offences. I've tried to keep out of trouble but times are bad.

PO: Does the girl you live with know what you were going to do?

D : No.

PO: Are you sure you haven't broken into anywhere or stolen anything this morning?

D : No.

After D had signed the interview notes to indicate that he agreed they were accurate the interview was terminated.

The images conveyed in the official record of the detention and interrogation of D in this case suggests a picture of a legitimate arrest following a legitimate stop and search founded upon the legitimate and "reasonable suspicions" of the patrolling officer. However, it is not clear whether, or how far, the reasons reportedly given for that arrest accorded with the suspicions actually held by the arresting officer. Furthermore, it would seem that the main purpose for detaining and formally questioning D was to gain additional evidence to support the offence for which he was reportedly arrested.³⁹ Since D is seen to emerge from the custodial interview as a ready and willing confessor, it would seem that the actions of the arresting officer were vindicated.

In their witness statements, the arresting officers in **Case WP2146** state that whilst on patrol they observed that a stationary car was enveloped in "a plume of smoke and flame". As they approached the car they saw DF walking away from the flames towards another stationary vehicle the passenger seat of which was occupied by DG. Despite being told to stay where they were by the approaching officers, DF and DG ran off. However, on searching the area the officers found the suspects hiding in an adjacent field and arrested them on suspicion of

³⁹ See McConville (1993, p.31) who argues that "[t]he general practice of the police following arrest, is to detain the arrestee in order to obtain evidence by questioning." However, even in the pre-PACE era this practice was recognised and sanctioned in the report of the Royal Commission on Criminal Procedure (1981, Cmnd.8092, p.41) which noted that "[t]his has not always been the law or practice but now seems to be well established as one of the primary purposes of detention upon arrest." This departure from the earlier authorities was later confirmed by the House of Lords in *Holgate-Mohammed v. Duke* [1984] AC 473.

having stolen the car. At the police station the formal contemporaneously recorded interview conducted with DF was attended by his solicitor:

PO: I understand that you stole the Jaguar motor car from the [Golf Club] car park this morning. Is that correct?

DF: Yes.

PO: Can you tell me how you went about stealing it?

DF: I picked up a set of keys in the course of my work. I went for a drink with [DG] at the [Hare and Hound]. After that I went to [the Golf Club]. Not to steal a car but for a drink.

PO: You went to [the Golf Club] with [DG]?

DF: Yes.

PO: Carry on.

DF: When I got to the [Golf Club] I saw the Jaguar parked up on the car park and like a fool I went over and checked and saw if the keys fitted it. They did so I asked [DG] if he would follow me in the van while I went for a drive. I was driving up and down for a bit. I decided that the best thing to do would be to park the car and go but then I started panicking in case the car was fingerprinted of anything. Then stupidly I decided the best thing to do would be to burn it out. That's the picture when you come. [DG] had nothing to do with it; the burning or the taking. I'm sorry for the trouble or damage and everything.

PO: Do you smoke?

DF: No.

PO: What did you use to set fire to the car?

DF: There was some matches in the car.

PO: Did [DG] give you the matches or lighter to burn the car?

DF: No.

PO: He knew you were stealing the car from the [Golf Club]. Is that correct?

DF: Only when I actually took it, yes.

PO: So by driving your vehicle whilst you took the Jaguar he assisted you in the theft?

DF: I don't know if that's assisting or what.

PO: Did he encourage you by driving your car? What do you say to that?

DF: No.

PO: Would you have taken the Jaguar if [DG] hadn't driven your vehicle?

DF: Yes.

PO: So you were determined to take the Jaguar come what may?

- DF: If somebody had tried to stop me I wouldn't have taken it.
- PO: Can you describe how you set fire to the Jaguar?
- DF: I tipped a bit of petrol on it which was in the back of my van. I put petrol on and set it on fire. I put a match to it and set it on fire.
- PO: Did [DG] do or say anything to try and stop you setting the car on fire?
- DF: No, he was sitting in the van.
- PO: There have been several other vehicles destroyed in a similar manner in that same area. What do you know about them?
- DF: I don't know anything. I haven't taken a car for four years and for that one I got charged.
- PO: It seems quite strange that the circumstances were almost the same and you tell me that you know nothing about them.
- DF: I swear on my daughter's life, I haven't taken a car for four years.
- PO: It takes some expertise to get over a Jaguar steering lock. How did you do it?
- DF: I don't know I just put the key in and turned it and it came, it just started.
- PO: Was it just as easy with the door as well?
- DF: It was just the one key. It did both.
- PO: Where's this key now?
- DF: I threw it. I panicked when I saw you.
- PO: So you deny taking any other cars?
- DF: Yes.
- PO: Or attempting to take any other cars?
- DF: Yes.
- ...
- PO: Is there anything else you want to say about stealing the Jaguar and setting it on fire?
- DF: I'm just sorry that I set it on fire and stole it in the first place. It was a stupid thing to do. I didn't plan to burn the car, I just panicked. It was stupid of me. I'm sorry.
- PO: Is there anything else about other cars you want to tell me?
- DF: No. I haven't touched a car in four years and then it was just the one.

Beyond the appearance of a successfully concluded case, there are three salient features of this thirty-minute interview. The first is the remark made by the questioner at the start of the interview record. This remark might suggest that a pre-interview exchange between the police

and the accused, and perhaps the solicitor, had taken place. Alternatively, it may be that the remark was no more than a bare assertion of presumed guilt based upon information gleaned from the arresting officers. Indeed, the present study found that police questioners frequently commenced formal interrogations with such statements, the apparent object being to establish at the outset the parameters of their dialogue with detainees who, as in this case, are then invited to supply the fine details of their misconduct from within the tacitly defined framework.

The second relates to the attempts made by the questioner to elicit information from DF that would implicate DG. It will have been seen that these attempts, in contrast to the questions directed towards ascertaining the criminal responsibility of DF, made use of largely leading questions.

The third salient image stems from the impression that DF was permitted to give a largely unaided and voluntary account of his criminal activity. However, he does so by observing the convention or formula followed by the great majority of confessors. By this convention the confessor should make an early avowal of guilt; he should also intimate that his actions were irrational and aberrational and not premeditated; finally, the confessor should voice apposite expressions of remorse. In observing this convention the confessor may preclude or minimise the intensification of psychological pressure that might ensue should the police elect to adopt an aggressive stance in the interview. It is clear, however, that the convention or formula may be utilised by innocent as well as guilty confessors.⁴⁰

2. Interrogations in which D is confronted with apparently incriminating evidence

It was found that the interrogation records that fell into this category could be divided into two groups, namely: those in which the detainee was confronted with what appeared to be cogent evidence pointing to guilt; and those in which the evidence appeared to be less decisive. **Case CP2024** and **Case PN2202** are representative of the former, while **Case TP2221** and **Case NN2049** are examples of the latter.

The witness statements made by the officers concerned in **Case CP2024** detail that in the early hours of the morning they arrived at the home of D and, after having conducted a search of the premises by authority of a warrant issued under the 1968 Theft Act, arrested him on

⁴⁰ See n.8, *supra*.

suspicion of being involved in the robbery of a betting shop. His girlfriend (GF), who was present when the police arrived, is reported to have "accompanied" the officers to the police station where she was later interviewed.

During his period in custody at the police station D was formally interviewed on four separate occasions. It is reported that at the beginning of each of these contemporaneously recorded interviews D was properly cautioned. There is, however, no record in any of the relevant documents of his being notified of his right to legal advice. The following extracts are drawn from the official record of the interviews where it will be seen that the police, through means of persistent questioning based on what appears to be reliable information gleaned from their pre-charge investigations, methodically pursue their quarry, close off his options and bring him to "tell the truth". It will also be seen from these extracts that the police are greatly assisted in their efforts by a signed statement alleged to have been made by GF to the police while she was at the police station.

- PO: You have been arrested this morning on suspicion of robbery which occurred [on a specified date at the bookmakers situated at a specified address]. That was three weeks ago. What do you know about it?
- D : Nothing. I don't even know where the place is. I only know two shops down there....
- PO: How do you know these shops?
- D : Coz [GF's] mother lives just across the road.
- PO: Is [GF] your woman?
- D : Yeah.
- PO: When was the last time you were in [Pickleston]?
- D : About a month and a half ago. What day did this robbery happen anyway?
- PO: Friday.

The interview record documents that D was then asked and answered a series of questions relating to his movements prior to and after he had collected his wages from his place of work on the date in question.

- PO: Do you go to any bookies shops?
- D : No. I sometimes go into the one [in Puddlethorpe].
- PO: Do you bet?
- D : No. I ain't got no money to waste.

PO: Do you know where the bookies in [Pickleston] is?
D : No and that's the honest truth.
PO: [D] this robbery was committed at [a specified time and date], now according to your version of events you would have been at home then wouldn't you?
D : Yes. I'd have been watching the television.
PO: Apart from [GF] would anyone else be at your house then?
D : I don't know. People come and people go.

D then answered questions relating to his and to GF's income and expenditure. It is recorded that the interviewing officer then said "I am going to finish the interview now because I want to see how the enquiries are going elsewhere. I will speak to you later." The record indicates that after an hour had passed the second formal interview was initiated:

PO: [GF], your girlfriend?
D : Yes.
PO: How long?
D : 3 years.
PO: Do you get on well?
D : Yeah we get on.
PO: You not having any rows at the moment?
D : No.
PO: Have you ever given her large sums of money?
D : No.
PO: In the last month?
D : No.
PO: £200?
D : No.
PO: Two weeks ago?
D : No.
PO: Did you come back one night two weeks ago and give her £200?
D : Come back?
PO: To the house.
D : No.
PO: You are absolutely sure?

- D : I can't give her £200 I'm in debt with me car; kids need clothes.
- PO: So the answer is definitely no?
- D : Definitely no.
- PO: She wouldn't tell lies about you?
- D : No.
- PO: She's being spoken to in this police station. She has stated that two weeks ago you gave her £200. With that money she bought clothes and a suit for herself.
- D : Suit?
- PO: Clothes. Now at the start of this interview I asked you if you were getting on well, you replied yes and would she lie about you, you said no.
- D : Right.
- PO: So are you saying that [GF] is lying?
- D : If she's saying I gave her £200 two weeks ago, where did I get it?
- PO: That's our point [D], you got the money from the bookie robbery.
- D : ("made no reply".)

...

- PO: Ok, we'll show you the statement of [GF] next interview. Is there any more you want to say?
- D : No.

The interview was terminated soon after this point. The third interview commenced some sixty minutes later:

- PO: Ok, you have had time to think, did you give your woman £200?
- D : No I didn't give her money.
- PO: ... I believe she would remember whether she has been given money, especially £200.
- D : She should.
- PO: So why should she say that?
- D : I don't know. I didn't give her £200.
- PO: Well why did she say you did?
- D : I don't know. Listen, the day of the robbery I was off work with a bad back....
- PO: You're part time, you don't work Friday.

It is recorded that at this juncture one officer left the room and returned with GF:

- PO: [To GF] Have you just made this statement?
GF: Yeah.
PO: In this statement which is yours, do you say that that man there (indicates [D]) gave you £200?
GF: Yeah.
D : When did I give you £200?
GF: I told them the truth.

After GF had left the interview room:

- PO: You've just seen your girlfriend, [GF].... She's made a three page statement, she states you gave her £200 [at] about the time of the robbery. We believe this to be part of the proceeds of the robbery. In interview she also states that she bought some clothes with it. You were one of the persons responsible for the robbery at [the bookmakers in Pickleston] weren't you?
D : I wasn't in [Pickleston].
...
PO: Ok, I'm going to end this interview now. Before you go back to the cell I'll ask you to think very carefully about all we have said and remember we have given you every opportunity to tell the truth, haven't we?
D : Yes.

Fifty minutes later the fourth and final recorded interview began:

- PO: Again you've been given an opportunity to think about all that has been said. Can you remember [the date in question]?
D : Yes.

D was again asked to give an account of his movements. After he had done so, the officer pointed out that it departed from that given by GF:

- PO: ... [GF] remembers the Friday because ... you did something you've never done before and that was you dropped a wad of notes in front of her ... it was £200 that's why she remembers. Yet you deny both the money and the movements on Friday. Why is that?
- D : I couldn't tell you.
- PO: Is that because her story puts you out of the house without an alibi at the time of the robbery and the £200 was either part or all of the proceeds?
- D : No reply.⁴¹
- PO: She even goes into detail about how she received the money from you ... it must be the truth.
- D : No reply.⁴²
- PO: You are not answering some of the questions, now is that because we are starting to get to the truth?
- D : No reply.⁴³
- PO: Look [D], our information is you were involved in this Bookies job. We haven't just picked your name out of a hat. The fact that [GF] received some money from the job was all part of our information. Something which we have known long before today. You've persistently denied what [GF] has been saying although you agree she had no reason to lie. She has done what she thinks best for her man now what is the truth?
- D : Ok then, I'll tell you....

D went on to claim that on the day of the robbery while driving through Pickleston he was flagged down by a group of men who paid him £250 to drop them off and to say nothing. The remainder of the recorded interview was concerned with the identity of the men and the details of events he described. D, who maintained that he had not been involved in the robbery itself, was charged with dishonestly receiving part of the stolen money.

The impression gained from the case papers is one of a well-planned investigation which justly placed emphasis upon the custodial interrogation of a person strongly suspected of involvement in criminal activity. On its face, the interview record also suggests that, in spite of D's initial denials, the repeated questioning of him and the confidence exhibited by the police in their suspicions proved to be wholly justified. However, there is one clear feature of

⁴¹ It is not clear whether D is recorded as saying "no reply" or if he made no reply to the questions posed.

this case that requires closer consideration. This, as has already been mentioned, is the apparent failure of the police to inform D of his right to legal advice.⁴⁴ The absence of an adviser in any of the recorded interviews with D leaves the officers open to the charge that they actively denied him access to that advice. This presents a potential - if only slight - threat to the reception in evidence of the admissions reportedly made.⁴⁵

A second point concerns the questioning of GF. Since the actual statement attributed to GF is not contained in the committal papers it can be assumed that it did not form part of the case against D. This is perhaps surprising in light of the pivotal role played by the statement in the questioning of D. It may be that its omission could be defended on the ground that with the admissions made by D the statement of GF became evidentially superfluous to the case for the prosecution. Additionally, in spite of the legal status of GF as a competent and compellable witness, the prosecution may have had regard to an unwillingness on her part to give evidence against D. Nevertheless, without the statement itself or information as to the circumstances in which it was allegedly made a thorough assessment of the investigative practices of the police and their impact upon the present case is made more difficult.

The documents pertaining to **Case PN2202** relate that the complainant reported to the police that during the early hours of that day four hooded individuals, one of whom the complainant felt able to describe, had gained entry to his house, threatened him with a knife, tied him up and made off with £5000 cash together with items of jewellery. Later that day two detective constables went to the address of D1 and there arrested him. He was conveyed to the police station where he was formally interviewed by the detectives on three occasions, each being recorded by contemporaneously made notes. The first of these interviews was not attended by a legal adviser.

⁴⁴ Although s.58 of PACE and paras.6.1-4 of COP, C place an onus on detainees to request a solicitor, paras.11.2 and 15.3 of the COP require interviewing officers "immediately prior to the commencement or re-commencement of any interview" to remind detainees of their "entitlement to free legal advice" and to "ensure that all such reminders are noted in the interview record".

⁴⁵ Arguably, s.76(2)(b) of PACE would be relevant to this point. The section obliges the court to exclude from evidence those confessions that may have been, or were, obtained "in consequence of anything said or done" which was likely to render them unreliable. Presumably any argument constructed on the basis of the section would imply that the police deliberately deprived D of legal assistance. Alternatively, recourse could be had to the judicial discretion to exclude under s.78 or s.82(3). It should be said, however, that the absence of a solicitor in any of the interviews, even when coupled with the apparent failure of the police to notify D of his right to legal advice, would be unlikely to prevent the alleged admissions from being received in evidence.

PO: ... You were arrested earlier for an offence of robbery which happened at [a specified address on a specified day]. Were you involved in this robbery?

D1: No.

PO: Tell me where you were [that] evening.

D1: I was in [the White Horse pub].

PO: Who were you there with and what time did you leave?

D1: I was alone. I left there at about eleven.

PO: Did you speak to anybody there?

D1: I spoke to the gaffer's son.

PO: Where did you go when you left?

D1: [Giving an address], I don't know the number.

PO: Who were you with?

D1: I was alone.

...

PO: Where did you go when you left?

D1: Home.

PO: What time did you get home?

D1: About two.

PO: Was anybody still up when you got home?

D1: No.

D1 was then asked what time he got up and a number of other questions relating to his movements and the identity of persons with whom he came into contact on the following day.

PO: You answer the description of one of the [persons] who went to [the complainant's address] and threatened the occupants of the house with a knife and stole a lot of money. I propose to organise an identification parade. Before I do so I must ask you if you agree to stand on an identification parade?

D1: Yes I do.

Soon after this the interview was discontinued. The next recorded interview, which was attended by a legal adviser, took place the following day, subsequent to the identity parade.

PO: You understand what's happened so far?
D1: Yes.
PO: Do you have any complaints about the identity parade?
D1: No.
PO: You were identified by the complainant. Do you have anything to say?
D1: Yeah. It was a mistaken identity.

...

PO: He is certain you are the one, together with three friends, who broke into his house, armed with a knife and stole over £5000 pounds in cash and jewellery. How can he be mistaken?
D1: I don't know.
PO: He had a clear view of your face didn't he?
D1: What, at the parade?
PO: He had a clear view of your face at the house.
D1: I wasn't at the house.
PO: He said, "I recognise you".
D1: He's wrong.
PO: And you said, "Get face down".
D1: I didn't.
PO: Who had the knife?
D1: I don't know I wasn't there.

From this point and for the remainder of the fifty-five-minute interview the officer asked D1 questions as to his usual clothing; his employment; his leisure time; his income and expenditure; and the identity of his friends and associates. D1 is recorded as having answered each question before the interview was concluded with the questioner making the following statement:

PO: I have no further questions. I want you to think about what's happened and perhaps you'll tell the truth at a later interview. We have other enquiries to make and a number of people to arrest. We will conduct a further interview after a break for refreshments. You have seen this officer write

down the questions and answers. I will invite you to read the record and, if you agree it's a true and accurate record, to sign the notes.

The notes were duly signed by D1. Three hours and thirteen minutes later D1 was again formally interviewed in the presence of his solicitor. The contemporaneously made notes of this interview indicate that it commenced with the questioner asking, and D1 replying to, further questions on his background, his relatives, his clothing, his associates and his movements on the day in issue.

PO: What time did you say you got in?

D1: About two, half two.

PO: Where had you been?

D1: [Address as given earlier.]

...

PO: Who saw you go to bed?

D1: Nobody. Everybody was asleep.

PO: What time did you get up?

D1: About twelve.

PO: Did anyone see you before that?

D1: I couldn't tell you, I was asleep.

PO: So you could have come in at 9 a.m. and no one would have seen you?

D1: 9 a.m. everybody's awake.

PO: 8 a.m. then. No one could have seen you come in probably?

D1: Yeah, they probably wouldn't have.

PO: It's fair to say that at 8 a.m. of [that] morning everybody would still be asleep?

D1: I agree.

PO: So no one seen you, you don't think?

D1: No.

PO: The man who picked you out on the ID parade is in no doubt whatsoever that you were the leader of the four who robbed him. You were the one who had the knife. Have you anything to say?

D1: It's not true.

PO: You know him.

D1: I don't know him.

PO: You know his face.

D1: I've seen him a couple of times.

PO: And he's seen you a couple of times, and knows your face.

D1: He probably has.

PO: When your mask slipped down in the bedroom he immediately recognised you and said, "I know who you are".

D1: It's not true.

PO: You told him to, "look away and shut up". Yes?

D1: It's not true, I wasn't there.

PO: You slapped him across the face a couple of times. Yes?

D1: As I said I wasn't there.

PO: You grabbed his nightshirt whilst he was on the bed and held the knife up against his face and you wanted to know where the money was. Your exact words were, "if you don't tell me where the money is I'll stick this in you". Do you remember that?

D1: That's not true.

PO: You pulled the wire of the light out of the socket and the wire of the telephone out of the socket. You tied him up on the bed, face down. Yes?

D1: That's not true. As I said I wasn't there.

PO: When he was in a terrified state he told you where the money and jewellery was and you took it. Do you remember that?

D1: Not true. I wasn't there.

PO: And you, the one with the knife, cut him with it.

D1: That's not true.

PO: Which one of you went into the childrens' bedroom and terrified them?

D1: It wasn't me involved in any of this.

PO: You don't remember any of this?

D1: I wasn't there so how can I remember any of it.

PO: I'm not surprised. If I was in your shoes now I wouldn't admit to doing a thing like this either. So I can understand why you're lying. Is that clear?

D1: I'm not lying.

PO: There is no doubt in the witnesses' mind whatsoever and I want you to remember that you had the opportunity to tell the truth and express your remorse for this wicked and disgraceful crime and you haven't done so. Do you understand that?

D1: I'm telling you the truth.

PO: I have no further questions at this stage....

At this juncture, this the final recorded interview with D1 was concluded. The recorded interviews, when read in light of the associated case papers, suggest that the police, as a result of their pre-charge investigations, had fully acquainted themselves with the details of the case. The statements taken from the complainant, his family and neighbours, together with the results of the identification parade appear to have formed the basis for the evidently strong suspicions of guilt held by the police. In the interrogations that followed the identification parade these suspicions are not only articulated as confident assertions of fact, they also appear to have justified converting the interrogation from one concerned with eliciting voluntarily given explanations from D1, into one geared to pressurising him into making damaging (and of course "truthful") admissions.

A number of ploys are employed by the questioner in his attempts to intensify the psychological pressure placed upon D1. The most pronounced being, firstly, the attribution to the detainee of comments alleged by the complainant to have been uttered by his assailant and, secondly, the imputation that a brutal callousness lay behind the failure of the detainee to confess. It would seem that the use of these ploys did not trouble the legal adviser sufficiently to provoke him into intervening on behalf of his client.⁴⁶

As previously stated, the study identified a second group of interrogation records in which the detainee was confronted with apparently incriminatory evidence. These differed from those that fell into the wider category discussed above in the respect that either the evidence upon which the detainees were arrested or that about which they were later questioned appeared to be less cogent. The following two cases are examples.

According to the witness statements of two police constables in **Case TP2221**, AF and GM, being observed to be walking in the vicinity of recently activated shop alarms in the early hours of the morning, aroused the suspicions of the constables who proceeded to arrest them on suspicion of the burglary and attempted burglary of a fruit shop and an electrical appliances shop.

The following has been excerpted from the contemporaneously made record of the formal custodial interview with AF subsequent to the administration of the usual caution:

⁴⁶ It should be pointed out that the apparent passivity of the solicitor may be explicable on many grounds, including a lack of confidence or experience. See Baldwin, 1992, pp.28-9, 49-50, 51; McConville and Hodgson, 1993, pp.15-37, 169-171.

PO: Can you tell me what you were doing on [Main Street]?

AF: I was on my way to one of my friend's relatives.

PO: What friend would that be?

AF: [GM].

PO: And his relative?

AF: I don't know.

PO: You don't know the relative?

AF: I don't know who the relative is.

...

PO: Where were you actually stopped in [Main Street]?

AF: Outside the [supermarket].

PO: And you were with [GM] then?

AF: Yes.

PO: Where had you been?

AF: We'd been to the park.

PO: What had you been to the park for?

AF: No comments.

PO: Where had you been prior to going to the park?

AF: The [Bat and Wicket] pub.

PO: Had you been there all evening?

AF: Most of the evening.

PO: And what time did you leave the [Bat and Wicket]?

AF: Closing time I think.

...

PO: So you walked from the [Bat and Wicket] to the park?

AF: Yes.

PO: How long do you think you were in the park?

AF: Sorry?

PO: [Question repeated.]

AF: I wouldn't like to say, maybe an hour to an hour and a half.

PO: And you don't want to say what you were doing in the park?

AF: No.

PO: Did you meet anyone else in the park?

AF: No.

...

PO: When you were arrested you had some sort of mud or dirt on your clothing didn't you?

AF: I'm not sure, it was dark.

PO: Well you did. Can you give any explanation as to how that got on to your clothing?

AF: More than likely from the park; it's all grass and mud in the park.

PO: What were you doing in the park then?

AF: No comment.

PO: Why are you saying "no comment" to what you were doing in the park?

AF: Because when I was in the park it's nothing to do with you. You want to know what I was doing in [Main Street].

PO: I'm asking you to give an explanation as to how the mud got on to your clothing.

AF: No comment.

PO: Did you at any stage go behind the shops on [Main Street]?

AF: No.

PO: You're quite definite about that?

AF: Yes.

PO: At no stage did you go behind any of the shops?

AF: No.

...

PO: You have some cuts on your hand. Would you like to give an explanation as to how you got those?

AF: It's one cut, it's on my knuckle and it isn't a cut, it's a graze. You can see that yourself.

PO: Well it's a puncture wound, shall we put it that way? Can you tell us how you got that?

AF: It must have come from the park.

PO: From the park. You have also got one on your ring finger.

AF: None of them are cuts, that comes from this (AF "then indicated that he suffered from eczema").

PO: So you think that probably occurred in the park, the graze mark to your finger?

AF: Yes.

PO: And you were with [GM] all night?

AF: Yes.

...

PO: And you at no stage went behind any of the shops [in Main Street]?

AF: No.

PO: And you are not responsible for breaking into any of the premises?

AF: No.

PO: Can you tell me exactly where the officers stopped you on [Main Street]?

AF: Outside [the supermarket].

PO: You were on the same side of the road as [the supermarket]?

AF: Yes.

PO: Is there anything you wish to add or clarify?

AF: Just that I didn't break into any shop.

The formal interview was concluded at this point. The record of this five-minute interview, which was attended by a solicitor, conveys images which suggest that the questioner, who was unconnected with the actual arrest of AF, was not fully apprised of the issues relevant to the detention of the suspect. This may explain the appearance of the interview as a disjointed venture, one lacking an easily discernible direction or purpose.

One clear image to emerge from the recorded exchange is that of an interviewing officer making heavy weather of the questions put to AF concerning his movements prior to his arrest. It might be argued in defence of the approach taken by the questioner that the questions were intended to serve several ends. This approach, which in this instance may be characterised as laboured and hopeful, may have helped the interviewer to, for example, compare AF's account with that given by the arresting officers and with that yet to be given by GM; it may have assisted in the evaluation of the strength of the evidence already in the possession of the police and to assess the attitude of the detainee to that evidence; it may have been adopted to afford AF an opportunity to eliminate himself from the inquiry or to glean information that might be verified by the police; finally, the approach may have been taken in order to elicit information that would enable the questioner to seize on any inconsistencies or

contradictions made in the account offered by AF or, quite simply, to facilitate the acquisition of a confession.

Irrespective of the viability of these explanations, the case papers convey the impression of a hastily prepared and largely speculative custodial interrogation which followed, and was shaped by, an arrest that - though theoretically based upon the "reasonable suspicions" of the arresting officers - evidently failed to furnish the questioner with sufficiently precise information, or indeed evidence, to enable him to connect the suspect in any persuasive way with the alleged offence. Put alternatively, the questioning appears to have been directed towards producing evidence to validate the arrest, rather than being based upon evidence which justified the initial arrest.

Many of the features exhibited in **Case TP2221** may be observed in the following extracts from the custodial interviews of the detainees in **Case NN2049**. In this case the two detainees had been arrested on suspicion of stealing a van. The contemporaneously made notes of the custodial interrogation with D1 details that the interview began with the detainee being formally cautioned and of the reason for his arrest. It continues:

PO: Do you understand why you have been arrested?

D1: Yeah.

PO: Do you wish a solicitor present during the interview?

D1: No.

PO: Can you tell me who you were with last night?

D1: [D2].

PO: Can you tell me where you were?

D1: At [D2's] house.

PO: How long were you at [D2's] house?

D1: From 10.30 to 11.15 p.m.

PO: Where did you go at 11.15 p.m.?

D1: We were walking around.

PO: Doing what?

D1: Talking, you know, general things.

PO: Can you tell me where you were walking?

D1: Around [Stalkington] and then towards the college.

PO: Do you know the area well?

D1: No.

PO: Why were you going to the college?

D1: To meet two girls.

PO: Who are they?

D1: One was named [Tina]. I don't know the other's name.

PO: What were you going to do then?

D1: Walk around, talk.

...

PO: Did you meet them?

D1: No, because you arrested us.

PO: At around midnight last night the vehicle I mentioned was stolen from outside an address in [Crown Lane]. A witness called the police stating two youths were breaking into a green van and have driven off in it towards [Usher Road]. Some eight minutes later a uniformed officer was on patrol in his police vehicle when he saw a green van on the [Usher Road]. This officer can positively state that he saw the driver, a large built male with short hair wearing a blue shirt. [D1], I can only say that looking at you now, I would describe you as a large built youth with short hair wearing a blue T-shirt. Would you agree with that description yourself?

D1: Yeah.

PO: So I'll put it to you that the officer is quite correct and that he saw you driving that stolen vehicle last night.

D1: The officer's wrong then.

PO: You have agreed with me that the description is a fair one?

D1: Yes.

PO: And as I stated the officer gave the same description and from this information I believe you were the driver of that van.

D1: I can't drive.

PO: The stolen vehicle was abandoned a very short distance from where you were arrested. It seems such a remarkable coincidence that you and your friend, who had been seen by the officer in the stolen vehicle, were just round the corner from where it was abandoned. Would you agree?

D1: No.

PO: Perhaps then you could give me a feasible story?

- D1: I can't see that it's a coincidence at all.
- PO: Why?
- D1: 'cause a car gets stolen round the corner? No.
- PO: As I said it seems very strange why the officer should see you, describe you and even name the other youth who you know personally and then low (sic) and behold the vehicle is abandoned and the two of you are found a short distance away from the stolen car.
- D1: As I said the officer's wrong.
- PO: Well [D1] I believe the officer's quite correct and that you are telling lies about last night's events.
- D1: You're lying as well in saying I took it.
- PO: How would you describe the weather last night?
- D1: Warmish.
- PO: Not as warm as it has been lately though.
- D1: The nights have been the same to me, warm.
- PO: Why were you perspiring so heavily when you were arrested?
- D1: Not me.
- PO: The officer who arrested you has stated that both of you were sweating heavily.
- D1: No, I don't sweat.
- PO: [D1], I'll ask you once more and I want you to answer this last question truthfully if you can. Did you have any involvement with the stolen vehicle last night?
- D1: No.
- PO: I have no further questions at this stage....

At this point the thirty-seven-minute interview was concluded. The forty-minute custodial interview with D2, conducted by the same interviewing officer, also in the absence of a legal adviser, is reported in its contemporaneously made record to have followed a substantially similar course. The following is an excerpt:

- PO: This stolen vehicle was abandoned a short distance from where you were arrested. It seems very strange that the officer who saw you in the car should find you a short distance from where the car was abandoned.
- D2: No, because I'm not likely to walk to two police cars if I had just been chased by police in a stolen motor vehicle. I would have made my way in the opposite direction.

...

PO: I think that you are lying. I think your excuses are feeble and I believe that you and [D1] stole the motor vehicle, went for a ride, were chased by the police and then abandoned the vehicle. That's the correct version of last night's events isn't it?

D2: To your account yes but not to mine.

PO: I have no further questions....

Although the custodial interrogation of the detainees appears to have been conducted with the justification that they were reasonably suspected of involvement in the crime, it would seem that the questioner had little information upon which to proceed. Firstly, contrary to what the questioner had implied, the case papers make clear that the witness who reported the incident to the police had not in fact seen two youths perpetrating the crime. Rather, her witness statement states that while lying in bed she *heard* what she believed were two or possibly more youths breaking into the van. She contacted the police when, on looking out of her bedroom window, she saw that the van had disappeared. Secondly, the evidence of the patrol officer⁴⁷ is of doubtful pertinence or force since it cannot be determined here whether, or to what extent, the description he allegedly supplied actually implicated the detainees. It also cannot be determined whether the description allegedly given by that officer had been embellished or indeed fabricated by the questioner in order to draw the detainees into making a confession. While it is impossible on the basis of the interview record alone to test the strength of the "reasonable suspicions" held against the detainees, the reader may be left with the impression that the questioner failed in his attempts to present these suspicions and the identification evidence on which they were largely based as being beyond reproach. This impression is to some extent compounded by an image of a police questioner casting insufficiently focused questions about the respective interviews in the hope of securing damaging admissions.

⁴⁷ The officer's statement was not found in the relevant committal papers.

3. *Interrogations which seek to weaken the resolve of detainees*

A number of the interview records examined suggested that in their efforts to secure evidence that would assist prosecutions police investigators occasionally relied upon modes of questioning which, in effect, required detainees to resist police assertions of wrongdoing. Generally, such assertions were somewhat speculative, in that they were usually unsupported by "hard facts". Rather, in contesting the explanation of, or a line of defence adopted by the detainee during interrogation, the police appeared to draw the attention of the detainee (and that of external others) to the "rational" or "obvious" conclusions a police assessment of the evidence presented in an attempt to bring the detainee to accept the police view, to discard the unsatisfactory account the detainee may have offered and to make damaging admissions. **Case DP2122** and **Case PU2268** are in many respects illustrative.

The committal papers associated with **Case DP2122** detail that following the execution of a search warrant issued under the 1971 Misuse of Drugs Act, DB, aged nineteen, and her boyfriend, BF, aged twenty-four, who had been found lying in bed together when forcible entry was made by drug squad officers, were arrested and conveyed to the police station where they were interviewed separately. After their respective interviews the detainees were jointly charged with the unlawful possession of controlled drugs and with stealing a motor car. The following has been excerpted from the contemporaneously made record of the police interview with DB. The recorded interview, which was attended by her legal adviser, begins:

PO: You were arrested this morning at [a specified address] following the execution of a search warrant issued under the Misuse of Drugs Act, 1971. Do you understand?

DB: Yes.

...

PO: When we visited [the flat] this morning you were in bed with [BF]. Is he your boyfriend?

DB: Yes.

PO: How often do you stay there?

DB: Not very often.

PO: What time did you arrive there last night?

DB: About twelve. I can't remember; I never looked at the time.

PO: Did you go there with [BF] or arrive alone?

DB: I went there with him.

...

PO: How did you get to [the flat] last night?

DB: In a car.

PO: What car?

DB: You know already.

PO: This is an official interview with your solicitor. She doesn't know.

DB: A Saab.

PO: What Saab?

DB: I don't know, just a Saab.

PO: Whose Saab?

DB: His isn't it?

PO: In the flat this morning a number of drugs and drug related items were recovered. What do know about them?

DB: Nothing at all.

PO: By the bed where you and [BF] had been sleeping were two "spliffs", that is, cigarettes made up probably with cannabis. What about these?

DB: I know nothing about those.

PO: They were in an ashtray by the bedside. Isn't it true that you and [BF] probably smoked them last night?

DB: No.

PO: Do you smoke?

DB: Cigarettes.

PO: Also in the bedroom we recovered a small piece of cannabis resin. What about that?

DB: I know nothing about them.

...

PO: Have you ever smoked cannabis?

DB: No.

PO: On the floor by the coffee table in the lounge we recovered a small bag of cannabis bush, is that yours?

DB: No.
PO: Who's is it then?
DB: I don't know anything about any drugs at all.

...

PO: Also recovered from the lounge was just over a gram. of crack cocaine. What about that?
DB: I don't know anything about that.
PO: Have you heard about crack?
DB: Only in the papers.
PO: So you know it's a dangerous drug?
DB: Yes.
PO: Does [BF] use drugs?
DB: Not that I know of.

The officer proceeded to ask DB a series of questions as to her knowledge of several items found in the flat which, the police alleged, were used to produce crack. She professed ignorance of each of the items she was questioned upon.

PO: The flat is sparsely furnished and all the items I mentioned except the crack were on obvious view, particularly to someone staying there. I ask you again what do you know about all those drugs?
PO: I don't know anything about all those drugs, nothing at all.
DB: Isn't it true that you and [BF] used drugs and are concerned in the production of crack cocaine?
DB: No it's not true.
PO: Do you know if [BF] uses drugs?
DB: No.
PO: Have you ever owned a vehicle?
DB: Never.
PO: Can you drive?
DB: No.
PO: Were you out in the Saab last night?
DB: No.
PO: Do you know the registration number.
DB: No.

PO: What colour is it?

DB: Metallic black.

PO: Who drives it?

DB: [BF] does.

PO: Is the vehicle owned by you or [BF]?

DB: It's not owned by me anyway.

...

PO: The vehicle is registered in your name.... Whose vehicle is it?

DB: It's not mine, I've told you.

PO: Did you know that it's registered in your name?

DB: Yes.

PO: You are the registered keeper. Who owns it?

DB: I'm not saying anything to that, I'm sorry.

PO: Do you work?

DB: No.

PO: Do you sign on?

DB: No.

PO: What's your income?

DB: I haven't got an income at the moment.

PO: Does [BF] work?

DB: I don't know, I've never asked him.

PO: I have, and he doesn't work. He doesn't sign on either or have any income. The two of you drive round in this lovely vehicle and [BF] has a nice portable telephone yet neither of you have an income or have worked for some time. You both make a living from dealing in drugs don't you?

DB: No. No way is that true.

PO: Then how do you maintain this high living.

DB: It's not high living.

PO: The Saab, where did it come from?

DB: I don't know.

PO: Why is it registered in your name?

DB: Don't know.

PO: Did you complete any documents in relation to this car?

DB: No.

PO: Did [BF]?

DB: Don't know.

PO: I will tell you that we know the vehicle is a stolen one on false plates.

DB: I never knew that.

PO: Did you steal the car?

DB: No.

PO: Well you have been driving around in a Saab registered to you which is stolen.

DB: I never knew that.

PO: Don't you think you should tell us, under the circumstances, where it came from?

DB: I've got nothing to say. I don't know where it came from.

...

PO: We found the vehicle parked some distance away from the flat. Why was that?

DB: I don't know.

PO: It was parked away from the flat so that it couldn't be connected to you two if the police came across it. Isn't that true?

DB: Not true.

...

PO: Did you ask [BF] if the car was stolen?

DB: No I never ask questions to anybody.

PO: Is that because you don't want to hear the obvious answer?

DB: No.

PO: Did you ever ask any questions about the car?

DB: Never.

PO: Why not?

DB: I don't know. I just didn't think it was right.

...

- PO: It seems to me that you are a young girl under the influence of an older man who you wish to protect.
- DB: I'm not under the influence of anybody.
- PO: Are you frightened of him?
- DB: No.

At this point the hour-long interview was terminated. The interview record suggests that the police conducted their interrogation of DB with the object of ascertaining the extent of her involvement in the offences for which she was arrested and to elicit from her information that would strengthen the case against BF. The strategy employed by the police to meet this end, however, appears to have been to give DB the impression that their primary interest lay in the "drugs and drugs related items" that had been recovered. Certainly the police interest in the stolen car was not mentioned at the start of the recorded interview.⁴⁸ Indeed, it would seem that the solicitor was not made privy to the suspicions held by the police in this respect. Furthermore, the issue is initially introduced as a background matter; one that appears incidental to the subject matter of the search warrant. By the end of the interview, however - while the police appear to accept that DB (who had no previous convictions) was not a leading figure in any wrongdoing - the alleged car theft had become the central focus of the interrogation.

Although the detainees were jointly charged with offences relating to both the drugs and the car, it would seem that the police considered BF to be the prime suspect. DB, though also suspected, appears to have been viewed as a source of information that would inculpate BF. The recorded interview with DB suggests, firstly, that the questioner did not fully accept her claim that she was ignorant of the matters on which she was questioned and, secondly, that the questioner sought to undermine what seems to have been perceived as her misguided resolve not to incriminate her boyfriend.

The capacity of police investigators to use custodial interrogations as a means with which to challenge or discredit explanations offered by detainees who are believed to be culpable and to subject those detainees to psychological pressures that are deleterious to any resolve they may exhibit to sustain their claims to innocence is evident in **Case PU2268**.

⁴⁸ From the interview record alone it is not possible to determine whether COP, 1985, para.3.3 (now para.3.4, COP, C, 1991), had been observed. This requires the custody officer to inform detainees of the grounds of their detention "as soon as practicable and in any case before [they are] questioned about any offence."

In this case D3 was one of six individuals arrested and questioned in police custody on suspicion of having stolen a number of computers and/or of having conspired to acquire and dispose of these machines knowing that they were stolen. The following excerpts have been drawn from two of three contemporaneously recorded interviews held with the detainee:

PO: You have just been arrested in connection with the theft of a number of computers stolen from [a specified address on a specified date]. As you know we've just searched your business address. Who owns the company?

D3: It's a 50-50 split with [D1].

D3 was then asked several questions of a general nature about the business interests shared with D1.

PO: As you are aware we have recovered a number of computers which are stolen property. Can you explain how they came to be in your possession?

D3: We actually bought these machines from a company called [XYZ] who are based in [Templewell].

PO: And have you bought from this company before?

D3: No. This is the first time.

PO: How did you know about [XYZ]?

D3: From a company called [RST] who we have bought computers from in the past.

PO: And they referred you to [XYZ]?

D3: That's correct.

PO: Who was it at [RST] who referred you to [XYZ]?

D3: A chap called [D2].

PO: How long have you been buying from [RST]?

D3: Exact time, I don't know, but within the last [two years].

PO: And [D2] is the contact there that you've always dealt with?

D3: Yes.

The detective sergeant proceeded to ask, and gain answers to, several questions concerned with how regularly goods were bought from RST, the manner in which they were bought and the number and type of goods bought. The interrogation record continues:

PO: How did [D2] refer you to [XYZ]?

- D3: [D2] telephoned me. He said he had some computers, would I be interested in buying some. He said he could let me have them at a good rate.
- PO: What is a good rate? Were there figures mentioned?
- D3: I believe the total amount was nine and a half thousand pounds.
- PO: So if that's a good rate what would be the normal price?
- D3: About ten thousand pounds.
- ...
- PO: So we are only talking about a five hundred pound difference?
- D3: Yes.
- PO: He delivered them to you, when?
- D3: He didn't.
- PO: Tell me how it went.
- D3: ... [D2] invited me to go direct to his supplier who was [XYZ]. I then phoned [XYZ] and spoke to [D4]. He gave me the address where I was to meet him, collect the computers and hand over the cash. My response to that was that we never deal in cash, only in genuine invoices.
- PO: Do I take it then you always pay by cheque?
- D3: Always. I eventually agreed to pay half in the form of a cheque and the rest in cash, assuming that we had from his company a genuine invoice as cash was a very unusual way of conducting business.... There was an invoice so I had no reason to believe the deal wasn't genuine.

A series of questions and answers then followed on where the transaction took place and other details relating to that transaction.

- PO: How do you know that [D4] was from [XYZ]?
- D3: He gave me a card in that name.
- PO: And what about the receipt ... did you examine it before signing it?
- D3: I checked the amounts, the VAT number, then signed it.
- PO: ..., that receipt's worth nothing. It doesn't say anywhere what you've bought.
- D3: It says machines.
- PO: What sewing machines?
- D3: No, computer machines. As long as it says machines and has a VAT number.
- PO: So any receipt will do?

- D3: No, we're a reputable company.
- PO: It doesn't say computer machines. It could be any machines.
- D3: But it says I paid for the machines.
- PO: ... in fact this so called receipt is an advertisement order.
- D3: Yes but look at his card, it's got his name.
- PO: Exactly, it doesn't say that he's involved in selling computers.... Didn't you think that was unusual?
- D3: It was a good deal.
- PO: Too good to miss?
- D3: Not really.
- PO: ... you must have realised at some stage that this wasn't a straight business deal.
- D3: To start with I did but he gave me a receipt.
- PO: And you were quite happy so long as you got a receipt, any sort of receipt?
- D3: Yes.
- PO: Why didn't [D2] do this deal with you?
- D3: He said there was no profit in it for him. So he put me onto his supplier.
- PO: Why should he put you in touch with his supplier?
- D3: He said he couldn't make a profit on it.
- PO: You said that it was a very good deal.... Why didn't he buy the stuff, put a couple of hundred quid on and sell it on to you? He could have done that.
- D3: I don't know.
- PO: Let's just look at this then you're trying to tell us that you, an experienced business man who runs his own company, was naive enough to think that this was a legitimate deal? A contact puts you in touch with a supplier of his, instead of doing the business himself, you go to a backstreet warehouse to meet a man you've never done business with before, he's not in your line of business, he wants cash off you, which legitimate business men never deal in, and gives you this mickey mouse receipt.... And you expect us to believe that you never suspected that those computers might be stolen.
- D3: I thought it strange at first but he gave me the right answers and that receipt.
- PO: A receipt that means nothing, does it?
- D3: Well that's what he gave me.
- PO: Well this story just doesn't add up, just doesn't make sense.

After the contemporaneously made notes were read over to D3 and he had signed them, the three hour and ten minute long interview was concluded with the questioner informing him

that there were "numerous enquiries to be made into this matter". Some two hours later a second interview was convened. This interview is reported to have lasted for ten minutes:

- PO: We wish to ask you some more questions about these computers. After what was said earlier and having thought about it you must understand why we feel that you must have known that [they] were stolen.
- D3: I didn't know they were stolen. I still believe it was genuine.
- PO: But from the very outset this wasn't the normal type of business was it?
- D3: I believe they came from a stockholder who wanted to unload them.
- PO: But you knew as well as I do that the price you paid was well below the normal price.
- D3: Yes they were.

At this juncture the questions put to D3 began to be directed towards the disposal of the computers.

- PO: How can you sell them so cheaply?
- D3: Because we get them at a cheap price.
- PO: ... you cannot have bought these in good faith, because if you had you would have sold them in good faith, not so cheaply. All your actions over the selling of these computers suggests that there was something wrong with them.
- D3: I got a receipt though.
- PO: ... we still don't think you are telling the full story. With all the given circumstances how can you say that you've bought and sold in good faith?
- D3: I've got a receipt for them.
- PO: ... isn't all too good to be true? Do you honestly expect us to believe it all? I don't honestly think you can expect us to believe that story. It must have occurred to you that the computers were stolen.
- D3: I didn't think they were. I got them through the man at [RST].

...

- PO: You have had an opportunity to tell the truth, now why don't you?
- D3: I thought they were genuine. I bought them in good faith.

...

- PO: If it was the case that [D4] wanted cash and no cheque, surely you must have thought something was amiss?
- D3: I thought it dodgy to start with but not after.
- PO: So you agree then that to start with you thought it was dodgy, the alarm bells were ringing weren't they?
- D3: But the guy gave me a receipt and satisfied me they were straight.
- PO: So this to you was a straightforward, normal business deal?
- D3: Well it was unusual I know that.
- PO: Exactly, like I said, the alarm bells were ringing. The truth of the matter is that you chose to ignore them. All along you suspected that these machines were stolen and that's why you tried to protect yourself by getting a receipt isn't it?
- D3: Like I say he satisfied me.
- PO: The story you have given certainly doesn't satisfy us ... you're trying to tell us that everything was straight and above board as far as you were concerned all the way down the line.
- D3: Yes, as far as I was concerned.
- PO: The whole thing stinks doesn't it?
- D3: It may do but that's what happened.
- PO: ... we've still got some further enquiries to make. Is there anything you wish to correct or add?

The following day D3 was interviewed for a third time - over a period of one hour and eight minutes - before being charged. On the evidence of the contemporaneously made notes, this final interview seems to have been conducted in a similar, if somewhat less aggressive, manner as the previous two. In this interview D3 maintained that he had bought the computers in good faith. However, it is reported that he expressed a willingness to assist the police in their efforts both to recover the computers and to identify other persons concerned in their procurement.

Each of the three formal interviews with D3 were conducted in the absence of a legal adviser. Again there is no evidence within the committal papers of the subject of legal advice being raised either by the police or the accused. The interview record, however, does appear to illustrate the difficulties that confront the police in attempting to secure, through interrogation, evidence of criminal intent which, along with the *actus reus*, is normally required to establish the *mens rea* component of any alleged criminal activity before a determination of legal guilt can be found.

The excerpts from the first two recorded interviews with D3 depicts the interrogator as a knowledgeable, persistent and determined questioner. However, it would seem that the persistence and determination displayed by the officer in this case was to a considerable degree driven by an underlying presumption of guilt. The point at which this presumption begins to become evident in the interview record is marked by the contention that the receipt accepted by D3 was worthless. Prior to this assertion the questions asked of the detainee appear to be offence focused and non-hostile in nature. From the point at which the interviewing officer expressed his doubts as to the authenticity of the receipt his questions take on an increasingly accusatorial flavour. Thereafter the questions appear to be designed both to impress upon D3 that the questioner considered his account to be implausible, to discredit his persona as an honest businessman and to press him into admitting that he did not purchase the computers in good faith.

4. Interrogations in order to test or confirm police case theories

In the cases that formed the final category of images relating to the apparent purposes of custodial interviews conducted by the police and to the approach taken by officers during those interviews, it appeared that in order to secure evidence for prosecution, police questioners might not only confront detainees with ostensibly incriminatory evidence, or seek to weaken the resolve of resistive detainees, it became evident that investigators might also conduct interrogations either to confirm police-held case theories through the acquisition of admissions or, by challenging detainees to contest the evidence accumulated against them, so as to test and, where necessary, revise such theories. **Case MP2017** and **Case UP2093** are but two examples.

In **Case MP2017** two youths, D1, aged twenty-two, and D2, aged twenty, were arrested and formally interviewed at the police station after it had been reported that a woman had sustained an injury to her arm from a pellet that had been fired from an air rifle.

PO: So this afternoon roundabout lunch time was it?

D1: Yea.

PO: A woman was hit with a pellet in the back garden of her house. Now, first of all, I'll ask you straight out, are you responsible for causing that wound to that woman?

D1: No.

- PO: You wasn't? Are you aware as to how that wound occurred?
- D1: Yea.
- PO: You are? Alright then there's no rush. If you can tell me in your own words first of all what happened?
- D1: Me and [D2] were err, shooting the pellet gun in my mom's back garden.
- PO: And whereabouts does your mom live?
- D1: [Address given] and err, first we started shooting bottles and err, I got worried about smashing my mom's windows, so we err, started putting them on the fence.
- PO: You said there was you and [D2], who's [D2]?
- D1: [D2] is a good friend.
- PO: He's a friend of yours. Carry on.
- D1: And we err, decided to change around and start shooting down the bottom of the garden, and err, we put the bottles on top of the fence and started shooting them.
- PO: At the bottom of your garden?
- D1: Yea. And we were aiming at that and a err, we were shooting a few times and err, [D2] took a shot and then a lot of the family come out.
- PO: A lot of whose family?
- D1: The woman's family, the one who was hit.

D1 then answered questions as to the objects shot at in the garden and ownership of the pellet gun.

- PO: So what can you tell me about actual incident where this woman got hit with a pellet, cos no doubt you were aware that she had been hit?
- D1: Yea.
- PO: You were?
- D1: That's when we panicked and ran out of the house.
- PO: Can you tell me exactly what happened?
- D1: Err, well, we'd been in the garden and we went back in had a bit of dinner and we came back out again and err, we had a few shots at err, a couple of bottles and err, an old vase and we, you know, just messing about in round the garden and we put the bottle on top of the fence and err, I had a few shots. Then D2 had a couple and err, and err, you know, we realised we'd hit the woman.
- PO: Well I don't know because I wasn't there, you were. I want you to tell me what happened when, as you say, this woman got hit. How did you know she got hit?

- D1: Well, err, he fired the gun.
- PO: [D2] fired the gun?
- D1: Yea, and err, the woman sort of run into the house and then came back out with about four or five of the family.
- PO: You saw her run into the house?
- D1: Yea. That's when we, you know, packed up.
- PO: Because [D1] I think that you know very well [D2] took aim to try and hit that woman with a pellet.
- D1: No. He didn't take aim, he didn't take aim at all.
- PO: What was he aiming at when this woman got hit?
- D1: He was aiming at a little plastic bottle.
- PO: And where was that positioned?
- D1: On top of the fence.
- PO: So how did you know she'd been hit, you say she went running into the house?
- D1: Because she run, you know, and they all came out screaming and shouting.
- PO: All within a few seconds was that?
- D1: Yea, she was in and out and they were shouting you could hear them, you know.
- PO: What were they shouting?
- D1: Well, they were speaking Chinese.
- PO: Yea. So how did you know she'd been hit by a pellet.
- D1: Well they were right behind it, she was right behind it. At the time she was right behind, err.
- PO: What was she doing?
- D1: Err, I think she was hanging something out. Yea.
- PO: So how come she got hit with a pellet if it wasn't aimed at her? How do you know that, you didn't fire it did you?
- D1: No.
- PO: [D2] fired it.
- D1: I don't know then.
- PO: From where [D2] was standing with the gun, firing it at this bottle, where would it have gone if it had just missed, directly into this girl?
- D1: Yea.
- PO: Yes.
- D1: Yea.
- PO: Did [D2] say anything to you about you obviously saw her there? Well didn't he see her there?
- D1: He must of.

- PO: Course he must of, cos I believe that he mentioned something to you and unintentionally (sic) shot that pellet at that girl, didn't he? Didn't he [D1]? So tell me about it.⁴⁹
- D1: He just said he was going to scare her.
- PO: Yes.
- D1: And he didn't mean to hit her, as far as I know he just said he was going to scare her.
- PO: And he aimed it at her?
- D1: Well, he aimed it at the garden.
- PO: Directly, he looked as though he was aiming it at her, obviously you can't say because you didn't fire it but he said, "watch this" and aimed at her and fired, is that right?
- D1: Yea.
- PO: So what happened then?
- D1: Err, as I say she got hit, err, she ran in and err, we knew straight away, and they all come running out, shouting. And we just run in the house. I hid the gun upstairs and err, was down the road [when] two policemen come in a car and arrested us.
- PO: Is there anything else?
- D1: No. I'm just sorry the shot hit the person.

The sixteen-minute interview, conducted in the absence of a legal adviser, was brought to an end at this juncture. A superficial appraisal of this case would suggest that the interviewer was indeed concerned to have D1 give an account of the incident "in [his] own words". However, a closer examination highlights the capacity of police interviewers to manipulate both the agenda of an interrogation and, in consequence, the responses the detainee may legitimately supply. As this case demonstrates, this may be achieved without contravening, in any way that is manifest in the record, the provisions of PACE or its codes of practice.

The following extract from the record of the interview with D2, also conducted in the absence of a legal adviser, provides a further illustration of this theme. In this case the police control over the content of the interview and the level psychological tension in the interview is enhanced by referring to the comments made by D1 during his interrogation. It will be seen that while the seriousness of the crime is also emphasised, to further amplify the psychological constraints upon D2, the substance of the comments made by D1 are denied to the detainee.

⁴⁹ The source of the officer's information regarding what D2 had said to D1 - crucial as evidence of D2's criminal intent - is not made clear. This might suggest that an informal, pre-interrogation discussion had taken place between the suspects and the police.

- PO: Now I understand that lunch time today you'd been at the house of who, your friend?
- D2: My friend [D1].
- PO: And where does he live?
- D2: [Address given].
- PO: And is it right that, err, what were you doing at that address?
- D2: We were just firing my gun in his garden and like a little accident occurred.
- PO: Alright, before we go too deeply into that, you were firing a gun in his back garden. What gun was it?
- D2: It's, err, I don't really know what gun it is but what I've heard it's supposed to be [a named pellet gun] something like that. I don't really know but the shop where I bought it from, I've asked them for details and they said they hadn't got no books or nothing.
- PO: So the gun belongs to you?
- D2: Yea, it belongs to me.

D2 was then asked, and answered, questions pertaining to when the gun and pellets were purchased and from which shop. He was also asked about the objects that were used as targets, and the layout of the gardens.

- PO: Can you tell, tell me about this incident, what actually happened?
- D2: I just aimed it. I didn't mean to, like, hit the woman but I just aimed it and it hit her but I didn't even know it hit her until the guy came round the corner and said that I'd just hit his mom with the gun. I didn't even know.
- PO: I don't think that's quite right [D2], as I've said to you we've already spoken to [D1].
- D2: Yea.
- PO: And he has told us what happened.
- D2: Yea.
- PO: And he has told us what you said. Now I don't want to tell you what he told us and I don't really think he's got any reason to tell lies because I'm sure the same as you realised, that you are both in serious trouble with this. It's not just a game.
- D2: Yea.
- PO: It's a serious incident that's happened. This woman has been hit with a pellet.
- D2: Yea.
- PO: And she's in hospital, do you understand that?

D2: Yea.

PO: And I, all I want you to do is to tell me the truth.

D2: Yea.

PO: You say you aimed it at her?

D2: Yea. But it was an accident.

PO: Well if you aimed it, it wasn't an accident was it? Now is it right that you aimed it and you tried to hit her?

D2: Yea.

PO: You did?

D2: Yea.

PO: And you could see as soon as you fired the weapon, see it had hit her?

D2: Yea.

PO: What happened?

D2: Well what happened when?

PO: Well, you're saying to me you're in [D1's] garden.

D2: It was in the garden and we just like aimed it and fired it.

PO: Aimed it at the woman?

D2: ... you aimed it at her and you just carried on aiming and hit her?

D2: Yea.

PO: Could you see where you'd hit her?

D2: No.

PO: How did you realise you'd hit her after you'd fired it?

D2: When the guy came out.

PO: I mean, you could see you aimed it, you fired it.

D2: And then the people, like the family, come out.

PO: Is there any more you want to say about this?

D2: All I'm saying, I'm sorry, I didn't mean to do it.

PO: Well you can't say that because you did mean to do it.

D2: Well I did mean to do it....

The interview, which is reported to have lasted for some fifteen minutes, was terminated at this point.

The excerpts from the formal custodial interrogations of the detainees in this case suggests that as it was not in dispute that D2 had shot the complainant, the respective interviews were

geared to the acquisition of admissions that would confirm the suspicions or, indeed conclusions, held by the questioner. Put shortly, it would seem that the questioner had resolved from the outset that D2 had acted with the proscribed criminal intent and had deliberately injured the complainant. Rather than permit the detainees to give their own unforced explanations, the questioner, who appears to have been driven by presuppositions of guilt, is seen to dictate the course the interviews would take and to do so in ways which might cast doubt upon the voluntariness and reliability of the admissions made.

A significant number of the records examined suggested that the police carried out some of their custodial interviews with the express object of obtaining evidence by implicating detainees in an inquisitorial probe into case theories that could otherwise have been substantiated or discounted through more complete pre-arrest investigations. **Case UP2093** is an example.

In this case DP was arrested and formally interviewed in police custody after being implicated by a witness (WT) in an assault that had occurred earlier that morning. A more detailed account of the incident, the part played by the statement made by WT and the practical exercise of the suspicions harboured by the police will become apparent during the course of the following lengthy excerpt from the interview record:

PO: Can you read alright?

DP: Yes.

PO: [After the caution was read to DP.] Do you understand?

DP: Yes.

PO: [After the caution had been signed by DP.] Do you fully understand why you have been arrested?

DP: No.

PO: You have been arrested on suspicion of wounding a barman outside the [Tavern] licensed house at about midnight last night. Do you understand that.

DP: ("Nodded head.")

PO: Are you responsible for that wounding?

DP: No reply.

PO: Were you in town at the time stated?

DP: No reply.

PO: Could you give me your movements for yesterday evening?

DP: No reply.

PO: Do you know [WT]?

- DP: No reply.
- PO: Do you know where the [Tavern] pub is?
- DP: No reply.
- PO: Did you visit the [Tavern] licensed house last night?
- DP: No reply.
- PO: Do you know a man named [PR]?
- DP: No reply.
- PO: Why did you ask [WT] to take you to the [Tavern] last night?
- DP: No reply.
- PO: Do you intend answering any of my questions?
- DP: No reply.
- PO: If you've done nothing wrong this is your opportunity to tell us your movements last night. An innocent man surely would tell me.
- DP: No reply. ("Just looked at wall with arms crossed.")
- PO: What is clear is that around midnight last night a seemingly unprovoked violent assault was made on an innocent man resulting in him requiring hospital treatment for a wound to his head. I know I wasn't there nor do I believe was [my colleague: the officer making the contemporaneous notes] or [your solicitor] were there. Were you there?
- DP: No reply.
- PO: [WT] says you were.
- DP: No reply.
- PO: And two Asian men who chased you said you were there.
- DP: No reply. ("Still staring.")
- PO: Why would these people say you were there?
- DP: No reply.
- PO: If you've done nothing, tell me you've done nothing.
- DP: No reply.
- PO: [WT] dropped you and [PR] off at the [Tavern] didn't he?
- DP: No reply.
- PO: You were seeing a friend there apparently.
- DP: No reply.
- PO: But you didn't go in there did you?
- DP: No reply.
- PO: He collected you and your friend [PR] at just after 7 p.m. last night didn't he?

DP: No reply.

PO: He was driving his car wasn't he?

DP: No reply.

PO: You told him to take you to the [Tavern] didn't you?

DP: No reply.

...

PO: Is [WT] lying?

DP: No reply.

PO: He is going to be re-seen, if he is lying I would like to know.

DP: No reply.

PO: Can I take your no reply to mean that what he is saying is the truth?

DP: No reply.

PO: How long did he have to wait for you?

DP: No reply.

PO: About forty minutes?

DP: No reply.

PO: Which seat did you get into?

DP: No reply.

PO: Why did you shout, "go, go", when you got in the car?

DP: No reply.

PO: What's the problem over the money?

DP: No reply.

PO: Does someone at the [Tavern] owe you money?

DP: No reply.

PO: Is that someone the complainant, [BM]?

DP: No reply.

PO: Where did [WT] drop you off?

DP: No reply.

PO: Why did you hit [BM]?

DP: No reply.

PO: What weapon did you use?

DP: No reply.

- PO: Where's that weapon now?
- DP: No reply.
- PO: Do you realise how serious the allegations being made against you are?
- DP: No reply.
- PO: [WT] says he dropped you off at the [Tavern] to see a friend about money. [BM] leaves the pub and receives a severe blow to the head from behind. He is knocked to the floor and receives other blows two other people come out of the pub and chase those responsible for this unprovoked attack to what appears to a waiting get away vehicle, [WT's]. They see these men get in that car, the main man, the big man, is seen to get into the front passenger side, and the car drove off at speed. The registered number was taken. That same number relates to [WT's] car. [WT] corroborates those witnesses' story. He says it was you who gets into the front passenger seat and [PR] gets into the back, you're both very exited and out of breath, you tell him to "go, go", which he does. He asks you what's going on and you tell him. He then drops you off. Is that a true account of what happened?
- DP: No reply.
- PO: If it isn't tell me what happened.
- DP: No reply.
- PO: Bear in mind that it isn't any of us three present with you who are saying these things. It's the man who has known you for some time. Is he lying?
- DP: No reply.
- PO: Surely you'd want to give some explanation.
- DP: No reply.

It is reported that the interview continued in this manner until, after forty minutes had elapsed, the questioner asked DP to satisfy himself that an accurate interview record had been made.

- DP: I haven't made any interview record.
- PO: Will you read through these notes?
- DP: Can I have a word with my solicitor?

The request was granted. The interview resumed three minutes later.

- DP: I want to answer some questions.
- PO: OK, is there anything you want to say first?

DP: What I'm going to say is I'm going to give you times, that you stated, where I was. As a matter of fact I will tell you where I was from yesterday afternoon onwards.

DP went on to give a detailed account of his movements stating that he had attended a dental appointment, visited a friend and then visit WT at his house. He claimed that after leaving WT he went to a named fitness centre and there spoke to a named employee of the centre. DP concluded his narrative by explaining that he went to bed at eleven-thirty only to be woken by the police at three-thirty to be told that he was being arrested.

PO: So you say you never went to the [Tavern] at all last night?

DP: No.

PO: I think it fair to read to you a copy of a statement made this morning by [WT]. I'd ask you to reserve any comment until the end. [After the statement had been read.] Have you any comment on that statement?

DP: Fabrication.

...

PO: Can you give any reason why he should make a story like that up?

DP: No idea whatsoever.

PO: How would you describe yourself?

DP: I don't follow you.

PO: Height, age. etc.

DP: 6',6" to 7", about 10 stone and I'm 27.

PO: Short black hair?

DP: ("Nodded head.")

PO: Clean shaven?

DP: Yeah.

PO: Would you agree that you're bigger than the normal man?

DP: Than the average man, yeah, but I'm not the biggest man in [this area].

PO: While you were talking with your solicitor we have been informed that [WT] is back with us. His story has changed somewhat. I like to take a couple of minutes' break to see what's happening.

The officer withdrew from the interview room leaving his colleague and the solicitor with DP. Some seventeen minutes later the officer returned and resumed his questioning of DP.

- PO: Who can confirm the time you got home last night?
- DP: Me misses was in bed when I got home last night. She's sick. She may be able to confirm it.
- PO: OK, [WT's] story has changed ... unfortunately the statement he is now making has not been completed so I can't read that to you. Did you hire him as a driver?
- DP: No.
- PO: Did you tell him you couldn't use your own car because you'd got no tax?
- DP: No.
- PO: Why did you catch a bus yesterday?
- DP: Because I've got no tax. He knows I've got no tax that's why I asked a friend to look after my car while I was at the dental hospital.
- ...
- PO: So you maintain you weren't [near the Tavern] at all last night?
- DP: No.
- PO: What I find surprising is, having seen [WT] who is a very short thin man, why should he risk putting you in for something you're innocent of when he knows you know where he lives.
- DP: I admit I've known the man for over two years; I used to service his car and borrow it regularly.
- PO: I think you missed the point.
- DP: I know what you mean. So what you're saying is a violent man would go round to his house and assault him.
- PO: I feel sure that if you are totally innocent you would feel aggrieved that you have been taken out of your bed and brought here on the account given by your friend.
- DP: What you're saying is that if I'd have had an outburst and played up you would have let me go. I would like this mishap sorted out as soon as possible so I can return to my common law wife who is very ill at the moment with the responsibility of three kids.
- PO: I hope you will take my word that everything that can be done is being done as soon as possible. We are not here solely to prove a person's guilt but also his innocence.

The second statement made by WT was then read to DP.

- PO: Any comment?
- DP: It's all rubbish.
- PO: You'd have noted that certain things have changed in the two statements but the times and the names of those involved remain the same. I can only ask you again, why should he make this up?
- DP: I don't know.
- PO: It's perhaps the right time to tell you as well that as a result of what [WT] has said he has now been arrested.... Has [WT] implicated you in anything else at all?
- DP: I don't understand, implicated?
- PO: What I mean is, has he blamed you for any other criminal matters in the past?
- DP: No.
- PO: But it looks like he has today.
- DP: It seems so.
- PO: Any reason?
- DP: Like I said, I don't know.... I don't know what [WT] is up to for one and [the other witnesses to the incident] surely couldn't have described me.
- PO: OK, obviously as a result of this interview urgent enquiries must be made to prove or disprove your involvement so unless there is anything more that you want to say I will end this interview now.
- DP: I would like to [say that] the reason I was so uncooperative by not answering any questions that was put during the first part of the interview is because I was angered by the way I was arrested this morning, brought straight down here and accused, although now I am cooperating in anyway possible.

The interview, which according to the documentation covered three-hours and twenty-six minutes, was discontinued at this point.

The interview record in this instance conveys images of a custodial interrogation in which a person believed to be guilty is required to answer what appears to be the inadequately supported allegations which informed the case theory cultivated by the police. This image is buttressed by the apparent failure of the police to arrange for an identity parade. Presumably, this would have afforded the victim, witnesses and therefore the police an ample basis with which to either eliminate the detainee from the inquiry or to better connect him with the crime.

It would seem that in their failure to resort to this or any other investigative technique, the police elected to place extensive reliance upon the interrogation of the person implicated by a suspected accomplice so as to test and, if possible, to strengthen their evidently incomplete

understanding of the events attending the offence and of the offender. While many of the cases examined indicated that the police were often successful in gaining admissions through recourse to little more than a presentation of circumstantial evidence, in this instance this approach appears to have been frustrated by an initially uncooperative detainee whose eventual answers, given during a protracted interrogation in which the police are seen to employ number of manipulative tactics, forced the investigators into revising their original case theory.

Conclusion

The sample of interview records discussed in this chapter convey images of the police and of police investigative practices which contrast with those seen in chapter 10. In its consideration of police accounts of interrogations conducted in the period prior to the implementation of PACE and of the various ways in which police officers were depicted in those accounts, that chapter provided evidence to support the proposition that in the pre-PACE interrogation process the police were "strongly motivated by [a] desire to develop and maintain a stable identity as individuals and as a group".⁵⁰ The exclusive control enjoyed by the police over detainees, over the interrogation process itself and, finally, over the procedures under which exchanges between police officers and detainees were recorded and prepared for prosecution, gave the police the scope and capacity to "create and stabilize this identity" and, indeed, to construct images that worked to emphasise the objectionable characteristics of detainees and served to legitimate themselves as both "followers and upholders of societal norms".⁵¹

The evidence presented in this chapter would seem to suggest that the introduction of contemporaneous recording has reduced the scope for police officers to portray themselves and detainees in such stark and self-serving ways. However, the cases discussed also appear to suggest an increase in the use of a range of manipulative tactics by the police to secure compliance and or incriminatory material from detainees. This, raises the question of how far the PACE provisions for the contemporaneous recording of formal custodial interrogations has exposed the previously concealed reality of police-suspect encounters and, therefore,

⁵⁰ Pepinsky, 1970, p.388.

⁵¹ *Ibid.* See also McConville and Baldwin, 1982, pp.171-4.

allowed a full assessment both of the purpose of police interrogations and of the police in interrogations. This and related questions are addressed in the following chapter.

IMAGES OF THE POLICE-SUSPECT DYNAMIC: A COMPARATIVE ANALYSIS

Introduction

The preceding four chapters looked at a selection of pre-PACE and PACE interrogation records and considered the images they contain respecting police-suspect relations, individual detainees and, finally, police interrogation practices. This comparatively brief chapter will draw upon both the pre-PACE and PACE empirical data to highlight the more salient and generalisable lessons these data sets suggest may be learned.

Images of Custodial Interrogations: Pre-PACE and Under PACE

The study of 400 pre-PACE interrogation records, each associated with cases determined in the Crown Court, identified a clear leitmotif in the picture of police-detainee relations presented in the narrative accounts prepared by police officers. This took the form of a pronounced behavioural dichotomy between those detained and interrogated by the police and the police themselves. In short, the police accounts present a picture of police officers as models of integrity, probity and proficiency. This simplistic picture contrasted with an equally simplistic picture of detainees whose "illegal" acts and "reprehensible" qualities were revealed under the reasonable, logical and non-coercive questions put to them. Thus, while detainees were reported to have used expletives and criminal argot, and were shown to be willing to make admissions in exchange for some immediate gain, such as bail, police officers, who invariably appeared to be animated by high moral values, were not prepared to engage in deals, did not use bad language, were solicitous to the welfare and rights of suspects and, moreover, did not coerce admissions.

The authenticity, reliability and plausibility of the narrative accounts prepared by the police and, perforce, the images they convey of police-detainee interactions are called into question by the substantial body of anecdotal and material evidence, some provided by police officers themselves, which shows that in the pre-PACE investigative process some police officers were quite prepared to employ oppressive interrogative techniques and to

distort or indeed fabricate confession evidence in order to secure convictions against those believed to be guilty.¹

This evidence, together with the data and images discussed in chapters 9 and 10, permits the inference that the authority, powers and discretions delegated to officers in the period before the implementation of PACE enabled the police to further their own instrumental ends in the formally adversarial criminal justice process, that is, the construction of cases which worked to enhance the persuasiveness of the case for the prosecution and weaken the position of defendants.²

The images constructed in the pre-PACE police narratives were produced privately, they appeared as essentially unverifiable constructs which not only played a crucial role in the case assembled against the accused, they also played a part in subverting the rhetoric of criminal justice which presupposes the innocence of the accused. The images derived from the police accounts were invariably presented by the police as being intrinsic to their comprehensive, accurate and reliable records of the police-suspect dynamic. However, in the criminal justice process of the pre-PACE era, it was the police, and the police alone, who were empowered to produce and transmit such images. This served to obscure two fundamentally important issues. The first, the extent to which those images were pragmatic, functional and subjective reconstructions shaped by the legal demands of evidential sufficiency. Secondly, the extent to which such images worked to confer

¹ See, for example, Devlin, 1960, p.39; Royal Commission on the Police, 1962, *Final Report*, Cmnd.1728, para.369; *Sheffield Police Appeal Inquiry*, 1963, Cmnd.2176: concerning the appeals of two police officers against their dismissal from the Sheffield City Police Force. The dismissals followed an incident in which six persons, suspected of committing break-ins, were arrested, taken into custody and subjected to a series of prolonged interrogations. During interrogation a number of the suspects were "seriously assaulted" by officers who used a truncheon and "an instrument which was called a 'rhino tail'" (described as "a short flexible piece of gut-like material"). The charges against the suspects were dropped after, at the committal hearing, one of them stripped to the waist and revealed the weals and bruising he had sustained to the magistrates, as a result a police internal inquiry was initiated. However, a private action was also brought against the two detectives who pleaded guilty to charges under s.20 of the Offences Against the Person Act, 1861. At their appeal (under the Police (Appeals) Rules, 1943) against dismissal from the Force the appellants contended that "the assaults were committed pursuant to the instructions and under the supervision of senior officers", that they were under "undue pressure to obtain speedy results", that they received "wrong and biased advice to plead guilty" and that they were victims of "unfair discrimination in punishment" as between themselves and other guilty officers. In dismissing the appeals the tribunal severely criticised both the Force as a whole and senior officers who had conspired to concoct false versions of the incident in an effort to meet or mitigate the allegations against the appellants. For further discussions on the issue of police malpractice and the extraction or manufacture of confession evidence, see Morton, 1972, p.806; 1975, pp.830-31; Williams, 1979, pp.7-15; McNee, 1979, p.78; 1983, p.180; Holdaway, 1983, pp.32-5, 102-19, 124-9, 148-52; Smith and Gray, 1983, p.218; McConville, *et al.*, 1991, pp.83-4; Maguire and Norris, 1992, pp.14-15; Morton, 1993, pp.121-7, 251-77; Bridges, 1994, p.32.

² See Devlin, 1979b, pp.441-2; Williams, G., 1979, pp.9, 13, 15; Baldwin and Kinsey, 1982, p.265; McConville and Baldwin, 1981, pp.189-90; McConville, *et al.*, 1991, pp.11-13, 36, 65-75, 135-7.

legitimacy upon the power of the police to interrogate suspects and to adduce in evidence incriminatory statements alleged to have been voluntarily made by persons detained and isolated in police custody.

Thus, while the pre-PACE images of the police-suspect dynamic may be seen to be consistent with the preeminence of police interests, they may also be seen as products of the role the police are required to play in the adversarial process. In practice that role effectively obliges them not only to elicit damaging admissions from suspected persons who might prefer to exercise their legal right to remain silent, but also to *report* that which is destructive to the credibility of the accused rather than to *record* all exchanges between questioner and questioned in their entirety.³ Put shortly, the representations of social reality enshrined in the police narrative records of the pre-PACE era are more than mere products of police perceptions of that social reality, they are by definition partial, selective and tendentious constructs.

An attempt has been made, through PACE and its attendant Codes of Practice, to eliminate the scope for the manufacture and coercion of confession evidence by the police and to protect officers from unfounded allegations by defendants that they either did not make the admissions ascribed to them or that the admissions were coerced from them. In this regard, Table 3, which sets out the method used to record formal custodial exchanges between police officers and individual detainees, contrasts favourably with its pre-PACE comparator:

Table 3: Mode of interview record, pre-PACE and PACE

<i>Mode of record</i>	PRE-PACE	<i>n</i>	%	PACE	<i>n</i>	%
Police witness statements		394	98.5		8	2.9
Contemporaneous notes		4	1.8		242	86.1
Dictated by detainee		2	0.5		0	0.0
Tape-recorded		-	-		31	11.0
Not known		-	-		2	-
		400	100		283	100.0

³ See McConville and Baldwin, 1981, p.190; Sanders, 1987, pp.232-5; Maguire and Norris, 1994, p.73.

From this Table it can be seen that in the PACE sample of records of formal interrogations the vast majority of custodial interviews were recorded contemporaneously. This welcome product of the PACE reforms must, however, be considered in light of recent research which demonstrates that "official records of interrogations, even if 'verified' by contemporaneous notes and attested to by third parties such as solicitors, constitute only a partial representation of what transpired."⁴

The nature and scope of the current study, confined as it is to an analysis of official records of formal interrogations, prohibits a thorough, definitive and reliable assessment of the completeness of the records examined. However, other researchers have shown that crucial exchanges between police officers and detainees may not appear in the official record.⁵ Clandestine or "informal" interrogations may occur within or outside the police station and prior to or following formal interrogation.⁶ This would suggest that official (whether custody or interview) records may not provide an as close or comprehensive picture of the detention and interrogation process as some commentators have suggested.⁷ Moreover, the official record may serve (as it did in the pre-PACE era) to give an appearance of strict compliance with the rules while concealing any use that may have been made of manipulative or oppressive tactics.⁸

While the present study of interrogation records generated in the period following the introduction of the requirement for custodial interviews to be contemporaneously recorded indicates that duly recorded police-suspect encounters are indeed more open to external scrutiny than those of the pre-PACE era, and reflect what actually took place more closely, it also reveals that the crude dichotomies between the policed and the police, strongly evident in the pre-PACE sample, have become less distinct. The use of expletives and

⁴ McConville, *et al.*, 1991, p.58. See also Dixon, *et al.*, 1989, pp.200-1; Sanders, *et al.*, pp.140-4; Sanders and Bridges, 1990, p.506; Maguire and Norris, 1992, pp.46-7; Moston and Stephenson, 1992, pp.35-6.

⁵ Maguire, 1988, p.31; Sanders, *et al.*, 1989, pp.140-4; Dixon, *et al.*, 1989, pp.200-1; Sanders and Bridges, 1990, pp.504-6; McConville, 1992, pp.532-48; 1993, pp.71-2; Evans, 1993, pp.28-9.

⁶ See McConville and Morrell, 1983, pp.161-2; Sanders and Bridges, 1990, p.505; Dixon, *et al.*, 1990, p.133; Baldwin and Bedward, 1991, p.671; Wolchover and Heaton-Armstrong, 1991, p.242; McConville, 1992, pp.532-48.

⁷ See, for example, Irving and McKenzie (1988, p.102) who, in respect of off-the-record interrogations within the police station, claimed that custody officers, who under PACE are charged with the welfare of detainees and with the recording in the custody record of all matters relating to individual detainees, "were not prepared to allow any contact between suspect and investigating officer, save in the formal interrogation situation." (Compare this with Irving and McKenzie, 1989, p.183.) See also Maguire, 1988, p.33; MacKay, 1990, p.79.

⁸ See McConville, *et al.*, 1991, pp.58-60, 78.

criminal argot are examples. In the pre-PACE sample where either expletives or criminal argot were relied upon it was almost always either the defiant, disrespectful or morally corrupt detainee, rather than the reasonable, rule-compliant and morally upright police officer, who did so. This theme was not so clearly evident in the PACE sample.

The apparent pre-PACE, PACE divide may be represented in the number of individual detainees who were recorded as having used two or more expletives:

Table 4: Use of expletives by detainee, pre-PACE

<i>Expletives used by detainees</i>	<i>n</i>	<i>%</i>
Yes	57	14.3
No	342	85.7
Not known	1	-
	400	100.0

Table 5: Use of expletives by detainee, PACE

<i>Expletives used by detainees</i>	<i>n</i>	<i>%</i>
Yes	12	4.4
No	262	95.6
Not known	9	-
	283	100.0

As Tables 4 and 5 together indicate, detainees interrogated under the PACE regime were recorded as being less reliant upon expletives than their pre-PACE counterparts. Coupled with the apparent decrease in the use of expletives by detainees, the study also found a decline in their use of criminal argot and, as Tables 6 and 7 detail, a marked increase in the use of criminal argot by police officers:

Table 6: Use of criminal argot by the police, pre-PACE

<i>Criminal argot used by police</i>	<i>n</i>	<i>%</i>
Yes	26	6.5
No	373	93.5
Not known	1	-
	400	100.0

Table 7: Use of criminal argot by the police, PACE

<i>Criminal argot used by police</i>	<i>n</i>	<i>%</i>
Yes	51	18.6
No	223	81.4
Not known	9	-
	283	100.0

Clearly it is unlikely that with implementation of the PACE reforms detainees have become increasingly conscious of their manners and alert to how they might appear in the interrogation record to external others while, for their part, police officers have not only become less concerned as to how they might appear but have also become increasingly irreverent. Rather, the Tables suggest that, following the implementation of the PACE reforms, the latitude previously enjoyed by the police to sanitise the official record respecting their formal exchanges with detainees has, as a direct product of the requirement for formal custodial interviews to be recorded contemporaneously, been circumscribed.

One other clear and less contentious distinction observed in the course of the study between the pre-PACE and PACE records was that in the latter detainees were afforded greater opportunities to offer their own explanations in response to questions put to them by officers. Whilst this development may be attributed to the greater insight contemporaneously made interview records afford to formal interactions between

detainees and police officers, it also appeared to present an obstacle to the police project of furnishing the courts with strong, unambiguous accounts which were both favourable to prosecutions and generally damaging to the interests of individual detainees.

Another potential obstacle to this project lies in the PACE provision for free legal advice to all suspects who request it.⁹ In the pre-PACE era access to legal advice was permitted provided that "no unreasonable delay or hindrance" was caused to the police in the performance of their duties.¹⁰ Empirical studies conducted during this period suggest that this provision was used by the police to prevent almost 80 per cent of those detained and interrogated by the police from receiving legal advice.¹¹ As was seen in chapter 9, these studies gain a measure of support from the present study which found that as many as 96.2 per cent of detainees (n = 356) formally interrogated by the police in the period prior to PACE received no legal advice during interrogation.¹²

One possible explanation for the low number of detainees who were accompanied by a legal adviser during interrogation (n = 10; 2.9%) is that "few suspects actually ask[ed] to consult with a solicitor whilst in police custody."¹³ This, however, must be qualified by the consideration that the police have a significant role to play in the take-up of legal advice by detainees. As one researcher put it:

There can be no doubt that many, if not most, police officers only pay "lip service" to the existence of the right to see a solicitor.¹⁴

While it must be accepted that practice may vary between police stations and across police forces, research conducted in different forces following the introduction of PACE indicates a considerable increase in the number of detainees who request and receive legal

⁹ PACE, 1984, ss.58-9. Under the relevant Code of Practice the police are obliged to inform suspects of their right to legal advice both orally (COP, para.3.1) and by written notice (COP, para.3.1). S.58 of the Act provides that upon a suspect's request, access to legal advice must be permitted "as soon as is practicable." Though this may be delayed for up to thirty-six hours in cases of serious arrestable offences, it may not be denied outright.

¹⁰ Judges' Rules, 1964, para.(c) and accompanying Administrative Direction, para.(a).

¹¹ See Zander, 1972, pp.346-8; Baldwin and McConville, 1979, pp.145-52; Softley, 1980, pp.68-9.

¹² It should be stated that these figures discount the number of detainees who may have received legal advice prior to interrogation. As such it is quite possible that some detainees received legal advice over the telephone.

¹³ MacKay, 1984, p.37, cited in MacKay, 1990, at pp.75-6.

¹⁴ *Ibid.*, at p.75.

advice. Both Brown (1989) and Sanders, *et al.*, (1989), for example, found that request rates had risen to around 25 per cent and advice rates to about 20 per cent. The current study of the interrogation process under PACE complements this research. The number of detainees who were formally interrogated in the presence of a legal adviser is set out in Table 8:

Table 8: Adviser's attendance at interrogation, PACE

<i>Adviser attends</i>	<i>n</i>	<i>%</i>
No	178	63.1
Yes (throughout interrogation)	90	31.9
Part of interrogation	14	5.0
Not known	1	-
	283	100.0

Again, as these figures are derived from a sample of official records, rather than by direct observation, the calibre, extent and nature of the legal advice received by detainees cannot be adequately determined.¹⁵ Nor can it be ascertained definitely whether (or what) tactics were employed against those who did not receive legal advice to dissuade them from seeking it. That the official record may not be a reliable source of information in this respect is demonstrated by Sanders and Bridges (1990) who found that in some 41.4 per cent of the cases they observed a number of "ploys", ranging from the "incomplete or incomprehensible reading of rights" to misleading suspects about their rights, were used to discourage detainees from seeking legal advice.¹⁶ The official record, therefore, may not operate as a means with which to constrain police impropriety. Indeed, as it is unlikely that police impropriety would appear in the official record, it may instead serve to "*mislead* rather than to inform."¹⁷

¹⁵ See, however, McConville and Hodgson (1993, pp.15-37) who found wide variations in the qualifications, experience and abilities possessed by legal advisers.

¹⁶ Sanders and Bridges, 1990, pp.489-504.

¹⁷ See McConville *et al.*, 1991, pp.48-55.

In spite of this the present study of records made of formal interrogations found (as Table 8 makes clear) that while there was an increase in the number of detainees who received legal assistance during interrogation, there remained a large body of detainees who did not. This permits the inference that although some detainees may have received legal advice prior to their formal interview or may have simply elected to waive their right to legal advice, others may have been dissuaded from exercising that right so as to heighten the persuasive influence of the police during their interactions with detainees and to reinforce their capacity to isolate detainees from the outside world.¹⁸

Leaving aside the vexed question of "informal" or off-the-record exchanges between detainees and the police (discussed above), the interrogation records studied suggested that manipulative tactics were employed by police questioners as a partial solution to both the greater scope given, by the obligation to create contemporaneous records, to detainees to express themselves in their own words and to the increase in the presence of legal advisers during interrogations. Figures illustrative of the incidence of the most commonly used manipulative tactics, leading questions¹⁹ and legal closure questions,²⁰ are set out in the following Tables:

Table 9: Police use of leading questions, pre-PACE

<i>Leading questions</i>	<i>n</i>	<i>%</i>
Yes	87	21.9
No	311	78.1
Not known	2	-
	400	100.0

¹⁸ See Walkley, 1987, p.20; Sanders and Bridges, 1990, pp.498-507; McConville, *et al.*, 1991, pp.52-5.

¹⁹ See chapter 12, p.361.

²⁰ *Ibid.*, p.362.

Table 10: Police use of leading questions, PACE

<i>Leading questions</i>	<i>n</i>	<i>%</i>
Yes	210	76.1
No	66	23.9
Not known	7	-
	283	100.0

Table 11: Police use of legal closure questions, pre-PACE

<i>Legal closure questions</i>	<i>n</i>	<i>%</i>
Yes	45	11.3
No	353	88.7
Not known	2	-
	400	100.0

Table 12: Police use of legal closure questions, PACE

<i>Legal closure questions</i>	<i>n</i>	<i>%</i>
Yes	148	54.2
No	125	45.8
Not known	10	-
	283	100.0

The Tables evidence a significant increase in the use of leading and legal closure question forms. This would seem to indicate that pre-PACE suspects were more willing to cooperate with police questioners and volunteer answers to police questions than their PACE counterparts. However this increase may be more apparent than real. Briefly, here

may be a previously hidden pre-PACE practice that, as a result of the requirement for the creation of contemporaneous records, is preserved in the interrogation records to a greater extent than was the case in the pre-PACE era when the overwhelming majority of formal interrogations were "recorded" after the event in the form of police witness statements. The point is that while contemporaneously made interrogation records may permit a more comprehensive representation of the interrogation process - and of police methods within that process - than their forerunner, they may not be any more complete or reliable.²¹

However, the frequent recourse police officers were observed to have had to these and other manipulative question forms²² suggests that custodial interrogations are often more directed by crime control objectives and driven by presuppositions of guilt and rather less by concerns to receive any genuinely non-induced or unprompted explanations detainees may care to offer to the police to allow them, perhaps through alternative investigative techniques, to seek verification.²³

Conclusion: Impact of the PACE Reforms

The data examined in the course of the present study strongly suggests that PACE has had little effect upon police behaviour. Although the contemporaneous recording procedures provide more immediate, if only partial "snapshots" of police-suspect encounters - and while the records examined appear to support the contention that "the police have abandoned many of their more egregious practices during formal interrogations"²⁴ - it is not clear to what extent the official record has served to merely

²¹ A point which Leo (1994, pp.93-102) appears not to have considered in his contention that "[p]sychological influence and manipulation have replaced the use of force and duress that was prevalent during [police interrogations of] little more than half a century ago." Though addressed to practice within American police forces, his argument - that there has been a "shift from physical to psychological strategies in interrogation methods" - has implications for any jurisdiction in which a supposed decline in the use of physical force and duress to extract confessions can be linked to "broader cultural developments" such as the increasing acceptance of "civility norms that condemn (and thus serve to increasingly restrain) the open expression of violence". If such an account of changes in police interrogation methods is to withstand attack it would (in my humble opinion) need to strengthen its theoretical foundations with healthy empirical evidence such as that afforded by data derived from the two periods he discusses. It would also need to recognise that the data may not yield reliable or accurate intelligence respecting either past or current police practices.

²² See chapter 12. See also Moston and Stephenson, 1993a, pp.105-11.

²³ It should be noted, however, that other researchers have suggested that police officers are now adopting non-coercive styles of questioning, at least at the initial stages of their formal interviews with suspects. On this see Moston and Stephenson, 1993a, p.105.

²⁴ McConville, *et al.*, 1994, p.116.

mask police malpractice rather than to reduce or eradicate it. And while the PACE provision for legal advisers to attend interrogations at the request of individual detainees appears to have ensured that many more suspects are accompanied by a legal adviser during interrogation, this may not present a major obstacle to police officers.²⁵ This is because legal advisers may be marginalised by the police during interrogations. Many, moreover, are inclined to adopt a non-interventionist or non-adversarial stance. Whilst others, unwilling to assist their clients even when the police adopt an aggressive stance during interrogations, may accept that the rigorous questioning of suspects is a legitimate part of the investigative process and, therefore, may cooperate with the police in the belief that their clients should be encouraged to answer all "reasonable" questions put to them by the police.²⁶

Furthermore, the Act does not appear to have had a marked affect upon the number of suspects who make either damaging admissions or full confessions of guilt. Out of the pre-PACE sample of 400 cases 342 (88.1%) of the detainees formally interrogated by the police made either full confessions or damaging admissions. The number from the research sample of 283 PACE cases was 248 (87%).²⁷

Whilst there is some research evidence to suggest that the introduction of PACE has led to a fall in the number of suspects who make admissions,²⁸ the present research would seem to confirm that recently conducted by McConville (1993), who found that from a sample of 534 cases 305 (58.2%) detainees either made or repeated confessions during formal interrogations at the police station,²⁹ and Evans (1993), who found that as many as 76.8 per cent ($n = 126$) of his sample made confessions to the police during detention and interrogation.³⁰ Thus, while it may not be possible to state conclusively that confession

²⁵ See Dixon, 1991b, p.44.

²⁶ See Baldwin, 1985, pp.32-3, 85, 88-90; 1993, pp.48-52; McConville and Hodgson, 1993, pp.155-71; McConville, *et al.*, 1994, pp.109-115, 126-7.

²⁷ It should be emphasised that the appearance of a high confession rate (as compared with other recent research) must be qualified by the consideration that as the pre-PACE and PACE samples examined here were composed entirely of cases determined in the Crown Court, the respective samples exclude detainees who may or may not have confessed/made damaging admissions but whose cases did not proceed to Crown Court trial. The samples also exclude those detainees who may or may not have confessed/made damaging admissions but who were not charged or prosecuted.

²⁸ Irving and McKenzie, 1989, p.234; Moston, *et al.*, 1992, pp.23-40; Gudjonsson, 1992, pp.51-4; Moston and Stephenson, 1993b, pp.33-42.

²⁹ McConville, 1993, pp.60-1.

³⁰ Evans, 1993, pp.22-4, 29.

rates have not been affected by PACE, the available empirical evidence in support of a decline in confession rates remains, as Moston and Stephenson (1993) contend, minimal.³¹

The continued success of the police in securing confessions may suggest that very few genuinely innocent suspects are detained and interrogated by them. However, another explanation may be found in the strong statistical correlation identified by Evans (1993) between the use of persuasive tactics by the police - the efficacy of which are enhanced when coupled with the situational and psychological pressures that operate upon detainees³² - and admissions or confessions.³³

The current study also suggests that the control over the interrogation process enjoyed by the police in the pre-PACE era has not been significantly impaired by the PACE reforms. For example, under PACE the police retain the authority to exclude non-police personnel from custodial interrogations.³⁴ They also retain the capacity to circumvent the contemporaneous recording requirements imposed upon them by the Act by conducting "informal" or off-the-record interviews.³⁵ Nevertheless, confessions secured in this manner are not rendered inadmissible by the PACE Act. Thus, the legitimacy of formal interrogations conducted under the PACE regime is assisted by the scope the Act leaves for "informal" (but legal) interviews. This consideration would suggest that continuing concerns over the authenticity and reliability of interrogation records have some justification.³⁶

The interrogation records of the pre-PACE era gave a largely sanitised and invariably police-drawn picture of police-suspect encounters. In that picture, suspects were almost always depicted negatively while the police generally emerged in a positive light. This partial, police-constructed, representation of social reality had the effect of emphasising the investigative character of policing and of downplaying its adversarial, confrontational and manipulative character.

The PACE regime, in providing for formal interrogations to be recorded contemporaneously, has undoubtedly reduced the capacity of the police to so distort reality

³¹ Moston and Stephenson, 1993a, p.103.

³² Moston, *et al.*, 1992, pp.25-31; Gudjonsson, 1992, pp.66-72, 301-4.

³³ Evans, 1993, pp.31-8.

³⁴ See PACE, 1984, COP, C, para.6 and the accompanying "Notes for guidance".

³⁵ Sanders and Bridges, 1990, pp.504-6; McConville, 1993, pp.71-2; Moston and Stephenson, 1993a, pp.111-3.

³⁶ See, for example, McConville, 1992, pp.532-48.

and, therefore, has enhanced the authenticity and reliability of the official record. Nevertheless, the absolute authenticity and reliability of the official record is compromised by the failure of the Act either to proscribe or effectively monitor "informal" interviews during which the private and normally undetectable application of coercion may occur.³⁷ Thus, while the contemporaneous recording requirements have made formal interrogations more accessible to external others and, therefore, have placed limits on the unwarranted manipulation of the suspect on the record or of the record itself, the PACE regime has left whole areas of the interrogation process, and consequently the methods employed by the police in that process, inaccessible to external scrutiny. In these "low visibility" areas the police may still have "informal" access to detainees and full control over the record of the outcome of any "informal" exchanges there may have been. As a result the police retain the ability to construct images of themselves both as upholders of societal norms and as disinterested principals in the fight against crime whose working practices - though constrained by due process values that as a result of PACE now have the force of law - help to distinguish them from the amoral and criminogenic defendant population.

This notwithstanding, the PACE reforms have served to open both the interrogation process itself and police interrogative skills to closer scrutiny. In this respect the observation that - contrary to the assumption that police interviewers are skilled in the art of investigative questioning - the overwhelming majority of officers receive little or no training in or supervision of their management of investigations and lack interview skills,³⁸ would appear, on the basis of the picture to emerge from the present research, to be a valid one.

The concern here has been to throw light both upon the instrumental benefits of custodial interrogation, that is, the acquisition of admissions or confessions and upon the importance the police attach to this, as demonstrated by the techniques they might employ, firstly, to secure admissions and, secondly, to deny that any such techniques have been used. In the pre-PACE era the legitimacy of the police project was entirely in police hands. The recording requirements of PACE has meant that the police have lost some degree of control over the legitimisation project. However, while the sanitised representations of social reality - as seen in the pre-PACE records - appear, on the basis of the PACE interrogation records, to have been eliminated, the legitimisation project may continued to be pursued in the "informal" and "low visibility" regions of the investigative process where the PACE reforms either do not apply or may be evaded.

³⁷ See *ibid.*, pp.536-45.

³⁸ Moston, *et al.*, 1992, p.32; Baldwin and Moloney, 1992, pp.65-75; McConville and Hodgson, 1993, p.197.

IMAGES OF CUSTODIAL INTERROGATIONS: CONTINUITY AND CHANGE

Introduction

In order to situate interrogations and confessions in a wider social, historical and political context, this study traced the origins and early development of key features of the criminal justice process as they evolved to shape its modern contours. In so doing the study highlighted some of the tensions that are intrinsic to a criminal process that has sought to incorporate within its formally adversarial structures values associated with crime control and rhetoric associated with due process.

The present chapter begins by offering a brief thematic overview of the historical evidence discussed in the earlier chapters. It then considers the place and role of the police in the criminal process having particular regard to the legal regulation of custodial interrogations prior to and following the introduction of the Police and Criminal Evidence Act, 1984 (PACE).

The Centrality of Confessions: Legitimizing Projects

The effective abolition in 1215 of the then common mode for testing offences, the ordeal, by edict of the Roman church, acted as the precipitating event for the establishment of the criminal jury as the paradigmatic form of adjudication in "serious" cases. Prior to the 1215 edict most prosecutions for felony cases were initiated by private individuals. Those cases not pursued by private appeal were instituted by means of communal accusation.

The procedures for public accusation were standardised by the Crown during the latter half of the twelfth century. By the beginning of the thirteenth century presenting juries had evolved beyond their role as communal informers and accusers; increasingly they were being employed to determine cases. This adjudicatory function was enhanced following the Papal edict issued in 1215.

The utilisation of the jury mode of trial reflected the developing social and crime control programme instituted by the Crown to assert its jurisdiction over all alleged felonies at the expense of jurisdictional rivals and expressed the growing official preference for human rather than divine structures for judgment and sanction.

The verdict of jurors sworn to tell the truth of the matter at issue could not, however, be legitimately had without the consent of the accused. The Crown, therefore, required that *peine forte et dure* be used against those who withheld their consent. Formally this coercive device was limited to securing compliance from those who, suspected of serious crime, refused to submit to petit jury trial. However, the historical evidence suggests that *peine forte et dure* was also used to extract confessions. Certainly, as an entirely pre-trial measure *peine forte et dure* was used to coerce information detrimental to the interests of accused persons in order to both facilitate and to legitimate the petit jury mode of trial not as a due process right (as it is conventionally viewed)¹ but as a means to further the social and crime control interests of the Crown. In short, "consent" was constructed through coercion in order to legitimise the law.

By the late Middle Ages, as a result of the social and economic forces that had disrupted the demographic composition and social structure of Medieval England, trial by jury, which had been reliant upon a relatively fixed population and was largely self-informing, had been transformed to one dependent upon evidence placed before it by royal officials.

Chiefly, it was the justices of the peace, drawn from the petty nobility and minor squirearchy, assisted in their administrative and law enforcement duties by parish constables, who fulfilled this vital evidence-gathering role. From as early as the late thirteenth century justices had been empowered, by virtue of authority reposed in them by the Crown rather than that derived from local communities, to investigate accusations and determine minor infractions against the peace. However, with the separation of function between presenting and trial juries and with the collapse of the self-informing quality formerly possessed by those juries, not only were justices made responsible for investigating offences and for initiating prosecutions in serious cases, they were also engaged in the production of evidence favourable to the case for the Crown.

This development meant that the burden of persuading jurors of the guilt of accused persons gradually shifted to the Crown and away from civilians who were no longer permitted to serve on the petit jury if they had prior knowledge of the issue. It also meant that the efficient management of the progressively bureaucratised criminal process would necessarily place greater reliance upon confessions made in open court in the form of guilty pleas and upon confessions made in the extra-judicial context. Certainly, the historical evidence indicates an increase, from the end of the Medieval period, in the incidence of compulsory extra-judicial examinations conducted by justices fashioned to obtain confessions from suspects and thus to secure conclusive convictions.

¹ For a notable example see Devlin, 1966, p.126.

The reliance placed upon confessions by the "pre-modern" criminal process was to become, over the succeeding centuries, an entrenched and defining feature in the evolution of its procedures. Furthermore, in spite of the concessions wrested from the state in the period beginning in the late seventeenth century and embodied in the rhetoric of due process, this structural reliance on confessional statements remains a fundamental aspect of the operation of contemporary criminal justice procedures.

As practice developed, the mid-sixteenth century bail and committal statutes came to rationalise, regularise and amplify the disparate arrangement of legislative measures that had given justices powers to investigate offences, to conduct pre-trial inquisitorial examinations, to compel suspects to answer interrogatories and to present the products of their efforts before the courts.

The compulsory *ex officio* oath procedures of the High Commission and Star Chamber Courts - through which suspects, under examination before church and royal officials, were compelled to incriminate themselves - served to complement the investigative and prosecutorial activities of the justices. The social and crime control project pursued by these courts was, in turn, supplemented by the royal prerogative authorising the infliction of physical torture on recalcitrant suspected and accused persons.

Geared to the coercion of incriminatory material, each of these methods of pre-trial examination, whether by justices under the sixteenth century Marian statutes, by the inquisitorial *ex officio* oath process or by practice of official torture, were characteristically conducted in private and away from public scrutiny. This feature, when set in contrast with the prevailing legal rhetoric of public accusation and public trial, suggests that it was recognised that these covert and quintessentially coercive pre-trial procedures were of doubtful legitimacy for the procurement of reliable confessions of guilt. This point is supported by the consideration that under the essentially inquisitorial procedures followed, it was envisaged that once a confession had been obtained its author would "freely" repeat it in open court. This meant that any due process requirement that existed for confessions to stand as *voluntary and reliable* admissions of guilt enabling them to be treated as incontrovertible proof of guilt, providing a legitimate basis for securing definitive convictions and for the legal imposition of punishments, could appear, at an ostensible and superficial level at least, to be satisfied. The point here being that under these pre-trial procedures, public legitimacy could be secured through private means and private coercion could be legitimated by public acts of confirmation.

The seventeenth century saw a popular reaction both to the virtual absence of express due process protections against unwarranted inquisitions and to the extensive social and crime control policies pursued by royal government. As a result official torture fell into disuse; the High Commission, Star Chamber and similar courts associated with the

inquisitorial oath were abolished; the due process principle, enshrined in the maxim *nemo tenetur prodere seipsum*, providing that no person should be compelled to incriminate themselves, began to be established; judges were gradually reconstructed as non-partisan, relatively passive umpires attentive to the interests of defendants; and later, in 1836, defendants became statutorily entitled to legal representation at trial.

During the late seventeenth and early eighteenth centuries, with the official acceptance of the privilege against compulsory self-incrimination - which was specifically conceded to defendants at the venue of their public trial though not, it will be recalled, to suspected or accused persons at the earlier stages of the criminal process - two fundamental and closely related due process precepts associated with the common law of evidence were also explicitly recognised. The first, that the burden of proving the guilt of an accused person was to rest upon the prosecution, reflected the consideration that in the formal setting of the court defendants could no longer be compelled to incriminate themselves. Moreover, those against whom criminal proceedings were brought were not to be placed under any obligation to prove their innocence to the trial court. Therefore the prosecution was to carry the burden of producing admissible evidence capable of sustaining its case. And, in persuading the jury beyond reasonable doubt of the guilt of the accused, it was required to discharge its burden without the aid of the accused.

The second closely related precept and fundamental rule of criminal procedure, the presumption of innocence, is no more than a concomitant of the first. It also reflected the consideration that defendants could not be obliged to assist the prosecution in its attempt to prove its case. The accused was to be entitled to remain silent at his trial. Indeed, the practice was such that, until the passing of the Criminal Evidence Act in 1898, the accused was prohibited from giving evidence on oath at trial. Although the prohibition may have operated to preserve the legitimacy of the oath as a truth-telling agent, it also worked to reinforce the principle that until such time as any prosecution brought on behalf of the state had succeeded in convincing the community, as represented by the trial jury, of the guilt of those it accused and had done so on the basis of admissible evidence, defendants were to be presumed innocent.

While the privilege against compulsory self-incrimination and its derivatives, the burden of proof and the presumption of innocence (along with many other evidential rules which may be traced to the seventeenth and eighteenth centuries) offered some due process protection to defendants from the de-legitimised inquisitorial methods, these key common law precepts also advantaged the prosecution since adherence to them conduced and legitimated good and firm convictions.² However, these protective principles of criminal

² See Kaufman, 1979, p.1; Zuckerman, 1989, pp.128-9.

evidence and moreover adversarial trial itself could be circumvented by the prosecution where persons accused of crime were alleged to have furnished the authorities with full confessions of guilt. In these circumstances a prosecution, unless successfully contested, could legitimately proceed to conviction without either the voluntariness or reliability of the alleged confession, or the circumstances attending its acquisition, being assessed in open court adjudication. This consideration demanded that attention be given to the operation of the pre-trial phase of the criminal justice process following the procedural reforms that began to be introduced from the late seventeenth century with specific reference to the mechanisms that were provided to ensure that confessional statements continued to facilitate and support criminal convictions.

In the context of a prosecution process that was increasingly accommodating the social and crime control problems thrown up by the changing productive relations brought about by mercantile capitalism and, later, by industrial capitalism, and in spite of the emergence of private associations for the prosecution of felons and other forms of private policing, justices of the peace continued to play a crucial and dominant role in maintaining order and meting out justice on behalf of central government. Armed with extensive inquisitorial powers dating from the sixteenth century which sanctioned the compulsory interrogation of suspected and accused persons, justices acted both as investigators and public prosecutors in the increasingly centralised law enforcement process.

By the middle of the nineteenth century, however, the justices had evolved into a judicial body. Thereafter the functions they had been expressly authorised by sixteenth century statute to perform gradually devolved upon the "new" uniformed, professionalised and locally based but centrally influenced police whose duties were to remain virtually unfettered by formal rules until the last quarter of the twentieth century.

Prior to the statutory reforms introduced by the PACE legislation the principal procedural constraint upon the evidence-gathering practices of either the justices, before their preferment to judicial office, or their subordinates, the police, was the judge-made evidential requirement that all extra-judicial admissions and confessions attributed to defendants be shown - to the satisfaction of the trial judge rather than the jury - to have been voluntarily made. Failure to so satisfy the judge would, according to the terms of the voluntariness test, result in the exclusion of the alleged confession. The exclusionary rule, therefore, existed as an express precondition to the admission in evidence of all disputed and non-disputed confessional statements alleged by the prosecution to have made in the pre-trial setting.

The construction placed upon the exclusionary rule by eighteenth and nineteenth century judges suggests that the common law voluntariness test constituted a clear articulation and extension of the privilege against self-incrimination beyond the trial to the pre-trial stages

of the criminal process. Although it was not to be fully formulated until nearly a hundred years after the emergence of the *nemo tenetur prodere seipsum* doctrine, the exclusionary rule was intimately linked with the privilege against self-incrimination in the respect that both worked to afford suspects qualified protection from conviction on the basis of coerced confessions. Indeed, throughout the nineteenth and early twentieth centuries the exclusionary rule was interpreted as having this specific function by, for the greater part, first instance judges in their individualised, case-by-case attempts not only to ensure the voluntariness, and thereby the reliability, of the confessions they received in evidence but also to discipline the unauthorised extra-judicial questioning of detained suspects by lesser law enforcement officers.

The mid-nineteenth century, however, was to witness the beginnings of a number of judicial attempts to restrict such applications of the exclusionary rule. This period in the operation of the rule was marked by concerted efforts mounted by the senior judiciary to ensure that the "reliability principle" predominated over the "disciplinary principle" as the primary and official rationale underlying the voluntariness test.

By this time, in the face of the acute social and economic changes set in train by the onset and development of industrial capitalism, provincial police forces, designed not only to strike a satisfactory compromise between local and central law enforcement objectives but also to preserve an acceptable level of autonomy for the police, had been established. Also by this time the police had begun to overcome the marked ideological, cross-class and, particularly from sections of the emergent working class, sometimes violent hostility that had been provoked by the creation of full time, salaried, military-style forces of the new socio-political order.

It was in this period that the police effectively assumed the central role in the prosecution process formerly performed by the justices.³ This role allowed the police, without express statutory authorization, to detain and interrogate suspects in the private space of the police station; to subject detainees to psychological (and sometimes physical) pressures in order to secure confessions; to deny detainees access to third parties; to make essentially unverifiable records of the interrogation process; to utilise, reinforce and indeed construct positive images of themselves and negative images of suspects contained in those records; to assemble evidence for prosecution; to initiate the vast majority of prosecutions;⁴ and (until the creation of the Crown Prosecution Service under the 1985 Prosecution of Offences Act) to actively steer those prosecutions through the judicial

³ Hay and Snyder, 1989, pp.4, 16, 39-47.

⁴ For an estimate of the proportion of prosecutions initiated by the police in the period under consideration see Devlin, 1960, pp.20-1; Sigler, 1974, p.643.

process. Again, prior to the implementation of the PACE reforms, the primary procedural restriction on the autonomy enjoyed by the police to subject suspects detained in their custody to private and unsupervised interrogatories, and to furnish the courts with confessions ascribed to detainees, was the evidential requirement for voluntarily made confessional statements. However, should the police contend that the accused was duly informed that he was not obliged to answer any of the questions put to him (that is, that the pre-trial expression of the privilege against self-incrimination: the "right to silence" was knowingly waived)⁵ and support this contention with a practically unchallengeable account of the interrogation,⁶ the necessarily *ex post facto* voluntariness test might - subject to the rarely exercised judicial discretion to exclude admissible evidence⁷ - be satisfied.

Inconsistent judicial rulings as to the scope of the voluntariness test and to the admissibility of statements obtained from suspects by police officers during custodial interrogations⁸ led the police, at the beginning of this century, to seek judicial clarification of their responsibilities. In 1912 this advice was enshrined in four "rules" promulgated by a coterie of senior judges acting in concert with the Home Office. In 1918 the Judges' Rules were extended to nine and, with their "revision" in 1964, remained in force as guidance to the police throughout the century until they were replaced in 1986 by Codes of Practice issued under PACE.

Beyond their formal status as procedural rules designed to alert police officers to the judicial attitude respecting custodial interrogations and to advise them of the overriding evidential requirement of voluntariness, the primary effect of the Judges' Rules was to confirm the preeminence of the police in the investigative and prosecution process and to further underpin the reliance placed by the criminal process upon confession evidence.⁹

⁵ Under the police "the caution has become a technique for the validation, as evidence, of statements, not only against the suggestions of 'fear or favour,' but against any suggestion that the statement was obtained by any process that might be called unfair." (Abrahams, 1964a, p.10.)

⁶ In *Bass* (1953) 37 Cr.App.R. 51, the Court of Appeal formally validated the practice of police officers collaborating, post-interview, to produce common, and therefore virtually unchallengeable accounts of custodial interviews for the courts.

⁷ See McConville and Baldwin, 1981, p.180; Zuckerman, 1989, p.313.

⁸ In this regard compare the judicial articulation of the voluntariness rule in *Ibrahim* [1914] AC 599, pp.609-14 with the comments made by Darling, J in *Cook* (1918) 34 TLR 515, p.516.

⁹ This much was acknowledged in the 1929 *Report of the Royal Commission on Police Powers and Procedure*, Cmd.3297, p.100.

The Rules were not a direct product of *stare decisis* (the doctrine which obliges judges to abide by judicial precedent as established through case law), however, as an extra-judicial statement of principle, they were intended as much for the guidance of judges as they were for the police since they served to fashion a judicial consensus out of what the relevant case law revealed had been sharply divergent judicial attitudes both to custodial questioning by the police and to the admissibility of allegedly voluntary confessions obtained by the police. Indeed, "acting on long experience", trial judges of the nineteenth and early twentieth centuries had often made "the assumption that a majority of persons, especially ignorant persons, and especially persons under anxiety, find it difficult not to talk to a questioner whose personality and function are psychologically impressive."¹⁰ However, in spite of this consideration, not only did the Judges' Rules effectively licence the pre-charge detention and questioning of suspects by the police, the Rules also worked to gradually silence that strand of judicial opinion distrustful of police power *vis-à-vis* the right of accused or suspected persons against self-incrimination.

In essence, the Judges' Rules were initially drafted as a result of concerns expressed by the police. They were designed to facilitate the acquisition of confessional statements by the police. Later, by dint of police working practices coupled with demands voiced on behalf of the police, the Rules came to legitimate the police power to interrogate suspects in custody and to supply the courts with defendants against whom confessions, admissions or other damaging material had been recorded by the police.¹¹ The Rules also legitimated the police as the sole recorders of exchanges between themselves and those detained by the police, giving the police full and absolute sovereignty over the contents of the records made and thus enabling the police to convey to the courts specific images both of those detained and interrogated and of the police themselves.

Ostensibly, the Judges' Rules were never intended to encourage or authorise the questioning or cross-examination of persons detained by the police,¹² rather the intention was to permit questioning in custody only to clear up ambiguities in statements voluntarily made by detainees after caution and in respect of the offence for which they had been arrested.¹³ Although this interpretation accorded with the principle that persons arrested by the police were to be taken before a magistrate without delay and were not to be detained

¹⁰ Abrahams, 1964a, pp.8-9.

¹¹ McConville and Baldwin in their pre-PACE empirical study found a close correspondence between police interrogations, confession evidence and convictions. (McConville and Baldwin, 1981, pp.106-114.)

¹² Home Office Circular 536053/23, 1930.

¹³ See Rule 7.

for the purpose of conducting investigations,¹⁴ it manifestly did not accord with prevailing police practice.

In an attempt to account for the capacity of police working practices to determine the breadth of police powers and for the corresponding failure of the executive or the courts to apply existing law, Devlin stated that:

It is part of the natural growth of an institution that, having been brought into existence for a purpose, it shapes and contains itself within rules for carrying out the purpose.... Each organ of inquiry into crime has begun informally and with freedom to behave as it liked; each has gone on to make its own practice and then its practice has been formulated in rules.... There is a constant drift, always in the same direction, from unfettered administrative action to regulated judicial proceeding. Any one who wishes to understand the part that the police now play in England in the investigation of crime, needs to have observed and understood that drift.... If asked whether the police can do such-and-such a thing with impunity, the answer may be, 'Possibly, but in practice they do not do it.' That means either that the practice is maturing or that a fully grown practice is not yet quite ripe....¹⁵

The historical evidence demonstrates that such remarks - which are essentially ahistorical and apolitical in nature since they suggest policing institutions evolve naturally from an unregulated to a regulated form - fail both to appreciate the reality of the adversarial criminal process within which the police operate and to recognise the value placed by that process on incriminatory material elicited from suspects whilst detained in police custody. Above all, such remarks do not acknowledge that the kind and quantum of regulation to which an institution such as the police is subject may, in great part, be a function of the police and their success in warding off greater regulation or other forms of accountability.

During the period following their establishment in the nineteenth century the "new" police were able to establish and preserve a considerable measure of autonomy and independence in respect of the exercise of their ill-defined and often unspecified powers. However, the case law demonstrates that on the subject of confession evidence obtained through custodial interrogations, the police were not, at the outset, given unqualified freedom to behave as they liked. Nevertheless, it may be accepted that during the period following the second World War and prior to PACE the working practices evolved by the

¹⁴ See Maitland, 1885, p.123. See also the Magistrates' Court Act, 1952, s.38; Devlin, 1960, pp.68, 71; Leigh, 1975, p.34.

¹⁵ Devlin, 1960, pp.9-10.

police in defiance of the early judicial authorities¹⁶ were, with the tacit consent of the executive and the courts, legitimated. In this way the ability of the police to supply the criminal process with material damaging to detainees interrogated in police custody was safeguarded.

For the police the practice of detaining and interrogating suspects before charge was (and continues to be) a highly desirable administrative aid since through it confessions, guilty pleas and thus convictions were virtually assured.¹⁷ Indeed, from around the second half of the century, with implicit support of judges who exhibited an inclination to treat confessions attributed to detainees as being voluntary,¹⁸ it became a routine investigative technique, one which by 1964 was accommodated in the revised version of the Judges' Rules.¹⁹

That the practice of detaining and questioning suspects for the purpose of securing incriminating evidence was prevalent prior to the introduction of the PACE reforms, was largely police-driven and was legitimated through crime control ideologies is confirmed by the decision of the Court of Appeal in *Mohammed-Holgate v. Duke*.²⁰ It was conceded by the Court in that case that the issue was "surprisingly, and perhaps significantly, bare of direct authority."²¹ Nevertheless, the Court confidently asserted that the police practice of interrogating persons under arrest for the purpose of obtaining admissions was "wholly familiar" and "perfectly common".²² Indeed, it was "a long-established and widespread practice".²³

For Latey J, the practice raised issues germane to the competing interests of crime control and due process.²⁴ However, as the power had "for a long period been so exercised without apparently any question or challenge", he did not, "think it right for the courts, at

¹⁶ See for example *Gavin* (1885) 15 Cox CC 656; *Male and Cooper* (1893) 17 Cox CC 689; *Knight and Thayer* (1905) 20 Cox CC 711; *Winkel* (1912) 76 JP 191; *Mathews* (1919) 14 Cr.App.R. 23.

¹⁷ McConville and Baldwin, 1981, pp.126, 132.

¹⁸ Williams, G., 1960a, pp.331-2.

¹⁹ See Rule 1.

²⁰ [1983] 3 AER 526, Court of Appeal; [1984] 1 AER 1054, House of Lords.

²¹ *Mohammed-Holgate v. Duke* [1983] 3 AER 526, Court of Appeal, *per* Latey, J, p.533.

²² *Ibid.*, *per* Arnold, P, p.531.

²³ *Ibid.*, *per* Latey, J, p.533, citing the Report of the *Royal Commission on Criminal Procedure* (1981, Cmnd.8092, para.3.66, p.41) in support.

²⁴ *Ibid.*, p.534.

any rate below the level of the House of Lords, to say that it [was] being wrongly exercised".²⁵ Lord Diplock, in the House of Lords, also saw a long history in the police practice of using the period of detention in order to question suspects and to procure evidence. He also maintained that it was a practice that had been given "implicit recognition" in the Judges' Rules.²⁶

Thus, in the view of the highest courts, and in apparent ignorance of the controversies of the nineteenth and early twentieth centuries,²⁷ it was and had for some time been perfectly proper for the police to arrest, detain and question suspects in police custody and to do so when the police themselves had decided that such action - with the "greater stress and pressure" it placed upon suspects - was more likely to secure incriminating evidence. Furthermore, the Court of Appeal made clear that:

the obtaining of a statement by means of the greater stress and pressure involved in the deprivation of liberty would in no way by itself make that statement a statement which was improperly obtained or a statement which would be rejected at a criminal trial.²⁸

The observations made by the judges in *Mohammed-Holgate v. Duke* are significant for they serve to elucidate the post-Second World War attitude of an increasingly corporatised judiciary not only to the success of the police in securing unmediated access to those held in their custody but also to the utility of the incriminating material the police attributed to defendants and tendered in evidence.

The virtually unfettered autonomy enjoyed by the police to detain and interrogate suspects before charge, to deny detainees access to solicitors and to prepare authoritative accounts of the investigative process for the courts rested upon the legitimating assumption that police officers could be relied upon to furnish the courts with accurate, reliable and complete records of their (legitimate *and* illegitimate) custodial interactions with detainees. The examination of cases drawn from the pre-PACE era, however, suggested that the police control of custodial interrogations and of the mechanisms through which interrogations were monitored afforded police officers considerable scope

²⁵ *Ibid.*

²⁶ *Holgate-Mohammed v. Duke* [1984] 1 AER 1054, House of Lords, p.1059. Lord Diplock also cited the 1981 Report of the Royal Commission (*supra.*, n.23.) in support of his contention.

²⁷ A substantial body of case law from this period "[r]epeatedly and emphatically ... ruled that the police do not have the authority, even after caution, to question or cross-examine an accused person who has been taken into custody". (Fellman, 1966, p.37.)

²⁸ *Mohammed-Holgate v. Duke* [1983] 3 AER 526, Court of Appeal, *per* Arnold, P, p.533.

to exploit this assumption. Operating within adversarial structures centred upon and epitomised by the descriptive model of a formal, public confrontation at trial between prosecution and accused, the police were accorded broad and unsupervised latitude to play a partisan role in their investigations, with strong incentives not only to coerce confessions which would facilitate convictions but also to draw upon and construct imagery broadly favourable to their own interests and damaging to the interests of those believed by the police to be criminally responsible. Unencumbered by the presence of "outsiders" the pre-PACE interrogation process enabled the police to elicit information conducive to the preparation of cases *against* - rather than about - suspected persons in a manner akin to the repudiated inquisitorial procedures notoriously employed by Tudor and Stuart governments or, alternatively, to those commonly associated with contemporary civil jurisdictions.²⁹ As Lord Devlin pointed out:

we rely upon the police to do the job that the procurator fiscal or the *juge d'instruction* does abroad. And, to that extent, we have made the police inquisitors.³⁰

Lord Devlin also explained that:

It is unnatural to fight quasi-judicially.... When a police officer charges a man it is because he believes him to be guilty, not just because he thinks there is a case for trial.³¹

Lidstone and Early go further in their contention that:

When a police officer arrests a man he does so because he believes he is guilty and the interrogation is an attempt to produce evidence of that guilt.³²

Thus, in the context of a criminal process which is premised upon the model of adversarial trial yet which displays inquisitorial features in its pre-trial stages, it would be erroneous to assume that the police officers adopt a non-partisan approach to their functions since the imperatives of prosecution and adversarial adjudication require the police "to present evidence which points to the guilt of the person standing trial" rather than to establish

²⁹ See, for example, Damaska, 1973, pp.506-89; 1975, pp.480-544; Lustgarten, 1986, pp.2-4.

³⁰ Devlin, 1979b, p.442.

³¹ Devlin, 1979a, p.72.

³² Lidstone and Early, 1982, p.507. See also McConville and Baldwin, 1981, p.190.

innocence.³³ Custodial interrogations, conducted on police territory and on police terms, provide the police with a method with which to implicate suspects in this process. Quite simply, for the most part the police interrogate in order to support the case for prosecution rather than to elicit information which would militate against prosecution.

This characteristic feature of the police function was reflected in the presumption of guilt frequently exhibited by officers in the records of invariably private and essentially inquisitorial interrogations examined in this study. It was also reflected in the manipulative tactics which were seen to have been employed by the police in order to obtain "voluntary" admissions. Finally, it also found expression in the largely negative images conveyed in those accounts respecting the detained, interrogated and prosecuted. Such images stood out in stark contrast to the generally self-promoting and self-legitimizing images of the police.

The message of the study is not, however, confined to the products of private interrogations but has implications for the nature of law itself and its legitimating forms.

In protecting the confession as an admissible and *prima facie* reliable specie of evidence, the law, as broadly conceived, has had recourse to a variety of legitimating forms. These have been utilised as the social organisation of criminal justice has changed at different historical moments and, typically, when there has been a crisis of legitimacy over prevailing arrangements. Take the example of examining justices. Although their authority was endorsed by statute it was also rooted in their status as respected members of the local community and in the view that their powers were only activated at the behest of individual complainants or victims rather than the state. Accordingly, their power to direct constables to arrest suspected citizens was used to ensure attendance at examination where the complaint would be appraised to ascertain whether a *prima facie* case could be made. The common law construct of voluntariness, which preceded the judicialisation of justices, functioned as a crucial aspect of legitimacy. Formally, this construct was consistent with the notion of law as a neutral and uniform code, it was protective of civil rights and was compatible with the freedom of the individual. The absence of detention and coercion was also associated with these conceptions.

In contrast the Judges' Rules, as a legitimating form, were *sui generis* since they were an invention of judges which operated at different levels. At one level they were expressed in terms of rules which in legal discourse convey the idea of authority, uniformity and compliance. At another level, however, they were not rules of law at all but merely codes of guidance. Here more than any other historical period, the use of "rules" in this ambiguous sense enabled the construction of the suspect as a free and voluntary agent who

³³ McConville and Baldwin, *ibid.* The authors illustrate their point with comments made by Sir Henry Fisher (See Fisher Report, 1977, p.203).

makes knowing and intelligent decisions, albeit in a disempowered setting. Thus, according to the sub-text of the Judges' Rules, it was entirely a matter for the informed and uninhibited suspect whether he or she would answer reasonable police questions or have a legal adviser in attendance during questioning.

For its part the Police and Criminal Evidence Act may be seen as marking the revival of statutory control and the restoration of regulation consistent with the rule of law. The procedural changes implemented under its provisions have meant that the set-piece interrogation has been transformed from an event which is *reported* to one which is *recorded*. Alongside this aspect of change however is another feature of continuity: the continued vitality of the non-recorded interrogation as admissible evidence. There are, therefore, two systems presently in existence. Under the first, legitimacy is secured through the construction of statutory control. However, this has been achieved alongside the second and less publicly known reality of continued admissible non-contemporaneously recorded interrogations. These contradictory features present problems not only for the legitimacy of law but also for the police who are given conflicting signals as to how they might legitimately go about their law enforcement duties.

Conclusion

Law secures its legitimacy through a number of embedded and enduring claims: law is relatively autonomous; it is founded in reason rather than coercion, though it might, as a last resort, secure compliance through force; it represents the general will of society as a whole rather than that of particular interests; it is universal in its scope and impartial in its application. Such claims embrace a number of subordinate claims, for example, that those responsible for operationalising and enforcing the law are themselves subject to legal regulation and are allocated discretion only in restricted and defined circumstances.

Collectively, these claims lend support to the notion of law as legitimate; indeed they are viewed as essential preconditions to legitimate law. However, the validity of such claims is called into question by a legal system that has permitted and encouraged the use in evidence of confessions obtained by means of, or in circumstances which might be construed as involving, coercion. Throughout the history of the criminal process, reliance upon confessions has resulted in an on-going struggle for the legitimacy of law and legal procedures. In respect of confession evidence this struggle has taken a number of different forms centred on the means by which confessions might be legitimately procured and utilised as evidence of guilt. As a consequence of this historical struggle the structures of the criminal process contain features of continuity and of change.

The dependence upon confessions has been one of the continuities in the history criminal justice in England. In one form or another, from admissions obtained by torture, through compulsory interrogation or cross-examination, to the utilisation of putatively voluntary statements, the English criminal justice system has always sought to use confessions as part of prosecution evidence. Elements of change, however, may be discerned in the various methods under which confessions may be lawfully obtained. Thus, while convictions founded on confessions made in the public setting of open court attract legitimacy through judicialisation and transparency, confessions alleged by official actors to have been made in the private domain and the means by which they are procured have necessitated the development and maintenance of legitimating structures. As part of the legitimisation project the privilege against compulsory self-incrimination has formally been extended from the trial to the pre-trial and private spheres of the criminal process. The requirement for voluntary confessions, the Judges' Rules and those of their successor, the Police and Criminal Act are more recent aspects of the legitimating project. Each, with varying degrees of success, have the object of defending the reliance placed on confessions by the criminal process and each seek to compensate for the absence of public supervision over the private and pre-trial application of state power on citizens.

As the site at which confessions might be obtained has shifted from public to private regions of the criminal process so legitimating forms have been evolved to safeguard the status of confessions and to protect the methods under which they may be obtained. Hence, according to the rhetoric of the law, no citizen shall be coerced into making confessions and, being presumed innocent until proved guilty at trial, all citizens are entitled, firstly, to remain silent in the face of extra-judicial questioning and, secondly, to have the benefit of legal advice during questioning.

Concurrent with, and in contrast to, the number of "due process protections" afforded to citizens, however, are crime control components which enable law enforcement personnel to proceed against citizens who, on being reconstructed as "suspects", may be lawfully subject to coercive force; to detain suspects in places secluded from public view not simply to ensure attendance at court in cases where there is fear of flight but to obtain evidence through questioning; to deny suspects access to legal advice when deemed necessary; and to construct cases against suspects around their uncorroborated confessions. The history of confession evidence may be seen as a legitimating project which seeks to reconcile these features of crime control with the principles of due process.

Once the coercion of confessions through official torture had lost its legitimacy, new structures were created to preserve the status and role of confessions. The powers given to justices to conduct extra-judicial examinations derived some measure of legitimacy from their subordination to statutory control, their accountability to the higher judiciary and the

openness of their formal interactions with suspects to public scrutiny. However, the fact that justices might engage in or be thought to engage in direct confrontation with the suspect, utilising the coercive powers of their authority, worked to threaten the legitimacy of both the system and the essentially inquisitorial examinations conducted by the justices at a time when such examinations were increasingly seen as being incompatible with the quasi-judicial status accorded to justices.

As other state actors (the police) took up the investigation and prosecution functions left by the judicialisation of justices, new legitimating forms were imported to sustain the notion of state power being operationalised only through and in accordance with due process of law. As the police assumed power to conduct interrogations in private, the legitimacy of confessions as evidence was called into question because there was no legal warrant to support police practices in this respect. Later, with the creation by judges of minimal and non-statutory constraints on their evidence-gathering powers, the police were able to produce self-legitimizing narratives to support their own investigative activities and the role of confessions in the criminal process. By fostering positive representations of themselves and their practices along side negative images of suspects, the legitimacy of interrogations was reinforced. However, increasing evidence of police malpractice (i.e. the formal and informal transformation of private practices into public knowledge) worked to undermine this edifice of legitimacy which was addressed by an official inquiry (the Royal Commission on Criminal Procedure, 1979-1981) and new statutory controls. Following the introduction of the Police and Criminal Evidence Act and its associated Codes of Practice, fresh strategies for legitimation are being developed to relegitimate the place of confessions in the criminal process which was called into question by a succession of miscarriages of justice in the 1980s and early 1990s.

Index of Cases

<i>Arnold</i> (1838) 8 Car. & P. 621.....	88,138
<i>Baldry</i> (1852) 2 Den. 430.....	92,96-99,102,114,133,136,138,142,148,170
<i>Bass</i> (1953) 37 Cr.App.R. 51; [1953] 1 QB 680.....	175,190,210-11,296,404
<i>Bathurst</i> [1968] 2 QB 19.....	166
<i>Bernard</i> (1908) 1 Cr.App.R. 218.....	167
<i>Berriman</i> (1854) 6 Cox C.C. 388.....	99,101,113,148,171,176,179
<i>Best</i> (1909) 1 KB 692;25 TLR 280.....	101,122,129,173
<i>Blunt v. Park Lane Hotel Ltd</i> [1942] 2 KB 253.....	195
<i>Bodkin</i> (1863) 9 Cox C.C. 403.....	101,127,148,171,185
<i>Booth and Jones</i> (1910) 5 Cr.App.R. 177.....	121,122,124-5,141,142,149,173,176
<i>Brackenbury</i> (1893) 17 Cox C.C. 628.....	101,122,129,132,142,173,176
<i>Bridgewater</i> [1905] 1 KB 131.....	166
<i>Brown and Bruce</i> (1931) 23 Cr.App.R. 56.....	182,190
<i>Butterwasser</i> [1948] 1 KB 4.....	166
<i>Callis v. Gunn</i> (1963) 107 Sol.J. 831;[1964] 1 QB 495.....	175,177,201,208
<i>Cass</i> (1784) 1 Leach. 293.....	78,100,131,137
<i>Cheverton</i> (1862) 2 F. & F. 833.....	101
<i>Christie</i> [1914] AC 545.....	177
<i>Christie v. Leachinsky</i> [1947] AC 573.....	204
<i>Clark</i> [1955] 2 QB 469.....	166
<i>Cokar</i> [1960] 2 QB 207.....	165
<i>Colledge's Case</i> (1681) 8 Cobb.St.Tr. 541.....	70
<i>Collier's Case</i> (1590) 4 Leo. 194.....	36
<i>Commissioners of Custom and Exise v. Harz</i> [1967] 1 All ER 177.....	208
<i>Cook</i> (1918) 34 TLR 515.....	174,175,176,178-9,404
<i>Cook</i> [1959] 2 QB 340.....	166,177
<i>Countess of Shrewsbury's Case</i> (1613) 2 Cobb.St.Tr. 770.....	35
<i>Court</i> (1836) 7 Car. & P. 487.....	84,91,170
<i>Cox v. Coleridge</i> (1822) 1 Barn. & Cress. 37.....	71
<i>Crowe and Myerscough</i> (1917) 81 JP 288.....	173
<i>Croyden</i> (1846) 2 Cox C.C. 67.....	93
<i>Doherty</i> (1784) 13 Cox C.C. 23.....	84
<i>DPP v. Ping Lin</i> [1975] 3 All ER 175.....	201,208
<i>Drew</i> (1838) 8 Car. & P. 140.....	88,100
<i>Duncalf</i> (1979) 69 Cr.App.R. 206.....	166

<i>Dunn</i> (1831) 4 Car. & P. 543.....	86,87,91
<i>Dwyer</i> (1932) 23 Cr.App.R. 156.....	175,177
<i>Dyer</i> (1844) 1 Cox C.C. 133.....	159
<i>Elliott</i> [1977] Cr.App.R. 551.....	177
<i>Ellis</i> (1826) Ry. & M. 432.....	83
<i>Enoch and Pulley</i> (1835) 5 C. & P. 538.....	83
<i>Felton's Case</i> (1628) 3 Cobb.St.Tr. 368.....	30,59
<i>Furley</i> (1844) 1 Cox C.C. 76.....	89,90
<i>Garbet</i> (1847) 1 Den. 236.....	138
<i>Gardiner and Hancox</i> (1915) 11 Cr.App.R. 267.....	173,176,177
<i>Gavin</i> (1885) 15 Cox C.C. 656.....	101,128,132,141,143,148,173,179,185,407
<i>Gilbert</i> (1977) 66 Cr.App.R. 237.....	323
<i>Gillis</i> (1866) 11 Cox C.C. 69.....	170,171
<i>Gowan</i> [1982] Crim.LR 821.....	208
<i>Grayson</i> (1921) 16 Cr.App.R. 7.....	182
<i>Greaves</i> (1980) 71 Cr.App.R. 232.....	175
<i>Green</i> (1832) 5 Car. & P. 312.....	87,88,138,143
<i>Harding v. Price</i> [1948] 1 KB 695.....	279
<i>Harris</i> (1844) 1 Cox C.C. 106.....	90
<i>Harris v. DPP</i> [1952] AC 694.....	177
<i>Hassett</i> (1861) 8 Cox C.C. 511.....	127
<i>Higson</i> (1849) 2 C. & K. 769.....	95
<i>Hirst</i> (1896) 18 Cox C.C. 122.....	101,122-3,133,142
<i>Histed</i> (1898) 19 Cox C.C. 16.....	101,132,141,143,148,171,173,176,179,185
<i>Holgate-Mohammed v. Duke</i> [1984] AC 473.....	336,408
<i>Holmes</i> (1843) 1 C&K 248.....	170
<i>Houghton</i> (1979) 69 Cr.App.R. 197.....	177,201
<i>Hudson</i> (1981) 72 Cr.App.R. 163.....	201,208
<i>Hudson</i> [1912] 2 KB 464.....	166
<i>Hughes</i> (1842).....	105
<i>Hullet's Trial</i> (1660) 5 Cobb.St.Tr. 1185.....	69
<i>Hurst</i> (1896) 18 Cox C.C. 374.....	173
<i>Ibrahim</i> (1914) AC 599	
.....	118,126,127,132,138,140,141,142,143,171,175,176,179,180,189,193,201,404
<i>Isequilla</i> (1974) 60 Cr.App.R. 52; [1975] 3 All ER 77.....	201,208

<i>Jackson</i> [1953] 1 WLR 591.....	167
<i>Jarvis</i> (1867) 10 Cox C.C. 57.....	100,118-9,139,142,143
<i>Jenkins</i> (1945) 31 Cr.App.R. 1.....	165,166
<i>Johnston</i> (1864) 15 ICLR. 60.....	102-116,118,140,141,142,143,148
<i>Jones</i> (1923) 17 Cr.App.R.117.....	166
<i>Jones</i> [1962] AC 647.....	165
<i>Kennedy, Steele and Meakin</i> [1963] Crim.LR 108.....	178
<i>Kerr</i> (1837) 8 Car. & P. 177.....	87,91
<i>Kimber</i> (1849) 3 Cox C.C. 223.....	95
<i>Kingston</i> (1830) 4 Car. & P. 387.....	86,87,91
<i>Knight and Thayre</i> (1905) 20 Cox C.C. 711; 69 JP 108; 21 TLR 310.	124,133-4,141,173,176,179,185,407
<i>Kuruma</i> [1955] AC 197.....	177
<i>Lambe</i> (1791) 2 Leach. 552.....	54,79-80,90,104
<i>Leckey</i> [1944] KB 80.....	168
<i>Lemsatef</i> [1977] 2 All ER 835.....	212
<i>Levy</i> (1966) 50 Cr.App.R. 288.....	166
<i>Lewis v. Harris</i> (1913) 30 LTR 109; 78 JP 68; 110 LT 377.....	125,139,173,176
<i>Littleboy</i> [1934] 2 KB 408.....	168
<i>Lloyd</i> (1834) 6 Car. & P. 398.....	84,90
<i>Long</i> (1833) 6 Car. & P. 179.....	84,90
<i>Male and Cooper</i> (1893) 17 Cox C.C. 689.....	101,129,140,141,148,173,179,185,407
<i>Massey</i> (1963) 107 Sol.J. 984; [1964] Crim.LR 43.....	178,181,190,203
<i>Mathews</i> (1919) 14 Cr.App.R. 73.....	173,182,407
<i>Maxwell v. DPP</i> (1934) 24 Cr.App.R. 152;[1935] AC 309.....	164,165
<i>May</i> (1952) Cr.App.R. 91.....	190
<i>Mick</i> (1863) 3 F. & F. 322.....	101-2,143,148,171
<i>Miller</i> (1895) 18 Cox C.C. 54.....	101,122,130,139,148,171,173,176
<i>Miranda v. Arizona</i> (1966) 348 US 436.....	323
<i>Mohammed-Holgate v Duke</i> [1983] AER 526.....	407-8
<i>Moore</i> (1852) 2 Den. 522.....	138-9,140
<i>Morgan</i> (1895) 59 JP 827.....	101,129-30
<i>Morton</i> (1843) 2 M. & Rob. 514.....	89,138,142
<i>Much</i> [1973] 1 All ER 178.....	167
<i>Naylor</i> [1933] 1 KB 685.....	168

<i>Nelson</i> (1979) 68 Cr.App.R. 12.....	166
<i>Noor Mohamed</i> [1949] AC 182.....	177
<i>Ovenell</i> [1969] 1 QB 17.....	177
<i>Parker</i> (1924) 18 Cr.App.R. 14.....	166
<i>Parman</i> (1963) 107 Sol.J. 984.....	190
<i>Pettit</i> (1850) 4 Cox C.C. 164.....	68,95-6,107,142
<i>Powell-Mantle</i> [1959] Crim.LR 445.....	190
<i>Prager</i> [1972] 1 All ER 1114; 1 WLR 260.....	201,208
<i>Preston</i> [1909] 1 KB 568.....	166
<i>Priestly</i> (1965) 51 Cr.App.R. 1.....	201,208
<i>Reason</i> (1872) 12 Cox C.C. 228.....	113,120-1,140,185
<i>Regan</i> (1867) 17 LT 325.....	119,139,142
<i>Rennie</i> [1982] 1 All ER 385.....	224
<i>Rhodes</i> [1899] 1 QB 77.....	167
<i>Rice v. Connolly</i> [1966] 2 QB 414.....	168,172,261
<i>Richards</i> (1852) Car. & P. 318.....	84,90
<i>Richardson</i> (1968) 52 Cr.App.R. 317.....	166
<i>Roberts</i> (1920) 15 Cr.App.R. 159.....	166
<i>Rogers v. Hawken</i> (1898) 19 Cox C.C. 122; 78 LT 655;62 JP 279; 67 LJQB 526.....	122,123,131,141,142,173
<i>Roswell's Case</i> (1684) 10 Cobb.St.Tr. 147.....	69,70
<i>Rudd</i> (1775) 1 Leach. 115.....	75,131,137
<i>Ryan</i> [1966] 50 Cr.App.R. 144.....	168
<i>Samsome</i> (1850) 4 Cox C.C. 203.....	95
<i>Sang</i> [1979] 2 All ER 1222.....	202,295
<i>Scott</i> (1856) 1 D&B. 47.....	139,170
<i>Selvey v. DPP</i> [1970] AC 304.....	165,166
<i>Sergeant</i> [1963] Cr.App.R. 848.....	182,190
<i>Sexton</i> (1823).....	81-2,91
<i>Shephard</i> (1836) 7 Car. & P. 579.....	97,87,91
<i>Slaughter</i> (1831) 4 Car. & P. 544.....	86,87,91
<i>Sleeman</i> (1853) 6 Cox C.C. 245.....	84
<i>Smith</i> [1961] 46 Cr.App.R. 51.....	178
<i>Sparrow</i> [1973] 1 WLR 488.....	167
<i>Spilsbury</i> (1935) 7 Car. & P. 187.....	94,90,139

<i>Stirland v. DPP</i> (1943) 30 Cr.App.R. 40.....	165,166
<i>Straffen</i> [1952] 2 All ER 657.....	181
<i>Stripp</i> (1856) 1 Dears. 648.....	112
<i>Stubbs</i> [1982] 1 All ER 424.....	166
<i>Sullivan</i> (1966) 51 Cr.App.R. 51.....	233
<i>Swatkins</i> (1831) 4 Car. & P. 548.....	86,148,210
<i>Tanner</i> (1978) 66 Cr.App.R. 56.....	166
<i>Taylor</i> (1923) JP 87.....	182
<i>The Trial of John Lilburn and John Warton</i> (1637) 3 Cobb.St.Tr. 1315.....	37-9
<i>Thomas</i> (1834) 6 Car. & P. 353.....	86
<i>Thomas</i> (1836) 7 Car. & P. 345.....	84,94,91,170
<i>Thomas and Cullen</i> (1961) Crim.LR 401.....	190
<i>Thompson</i> (1783) 1 Leach. 291.....	77,91,137,140
<i>Thompson</i> (1893) 2 QB 12; 17 Cox C.C. 641.....	129,141,175,185,283
<i>Thornton</i> (1824) 1 Moo. 27.....	83-4,90,139
<i>Tonge's Case</i> (1662) 6 How.St.Tr. 225.....	39,72-3
<i>Tool</i> (1856) 7 Cox C.C. 244.....	140
<i>Turner</i> [1944] 1 All ER 599.....	166
<i>Twelve Bishops' Trial</i> (1641) 4 Cobb.St.Tr. 63.....	39
<i>Twyn's Case</i> (1663) 6 Cobb.St.Tr. 513.....	70
<i>Voisin</i> (1918) 13 Cr.App.R. 89.....	173,174,175,176,177-8,182,192
<i>Warickshall</i> (1783) 1 Leach. 263.....	76,86,88,120,131,137,139,170
<i>Wattam</i> (1952) 36 Cr.App.R. 72.....	176,190
<i>White's Case</i> (1741) 17 How.St.Tr. 1079.....	74-5,131
<i>Whitehead</i> [1929] 1 WLR 488.....	167
<i>Wild</i> (1835) 1 Moo. 452.....	87,90,138
<i>Wilson</i> (1817) Holt. 597.....	82,91,108,140,142
<i>Winkel</i> (1912) 76 JP 191.....	173-4,175,176,182,407
<i>Wolmington v. DPP</i> [1935] AC 462.....	157
<i>Wong Chiu Kwai</i> (1909) 3 HKLR 89.....	128,134-7,141
<i>Wood</i> [1920] 2 KB 179.....	166
<i>Wright</i> (1910) 5 Cr.App.R. 131.....	166
<i>Yeovil Murder Case</i> (1877) 41 JP 187.....	121-2,185

Index of Official Publications

Criminal Law Revision Committee, Eleventh Report,
Evidence (General) Cmnd.4491, (1972).....162,277,284-5,290,323

*Report of an Inquiry by the Hon. Henry Fisher into the
circumstances leading to the trial of three persons
on charges arising out of the death of Maxwell Confait
and the Fire at 27 Doggett Road,
London SE6, (1977).....286-7,296,297,410*

*Report of an Inquiry by the Hon. Mr Justice Brabin
into the case of Timothy John Evans, Cmmd.3101, (1966).....199*

*Report, by J Sott Henderson QC, of an Inquiry into
Certain Matters arising out of the Deaths of Mrs
Beryl Evans and of Geraldine Evans and out of the
Conviction of Timothy John Evans of the Murder
of Geraldine Evans, Cmd.8896, (1953).....199*

*Report of the Royal Commission upon the
Duties of the Metropolitan Police, cd.4156, (1908).....186*

*Report of the Royal Commission on Police
Powers and Procedure, Cmd.3297, (1929).....171,174,182-3,184,186-90,204,404*

*Report to the Secretary of State for the Home Department
of the Departmental Committee on Evidence on
Identification in Criminal Cases, (1976).....258-9*

Royal Commission on Criminal Justice,
Report, Cm.2263, (1993).....1-2

Royal Commission on the Police, *Final Report*,
Cmnd.1728, (1962).....200,206,226,283,385

Royal Commission on Criminal Procedure,
Report, Cmnd.8092, (1981).....288-95,297,323,336,407

Royal Commission on Criminal Procedure,
*The Investigation and Prosecution of Criminal
Offences in England and Wales: The Law and Procedure*,
Cmnd.8092-1, (1981).....289

Royal Commission on Criminal Procedure,
The Balance of Criminal Justice, Cmnd.8092-2, (1981).....295

Sheffield Police Appeal Inquiry (1963) Cmnd.2176.....385

BIBLIOGRAPHY

A Barrister (1967) "Questioning: A Comment", *Criminal Law Review*, 91.

Abrahams, G. (1964a) *Police Questioning and the Judges' Rules*, London: Oyez.

Abrahams, G. (1964b) "The Judges' Rules", 108 *Solicitor's Journal*, 106.

Allen, A.K. (1953) *The Queen's Peace*, London: Stevens.

Allen, C.K. (1953) "Unsworn Statements by Accused Persons", 69 *Law Quarterly Review*, 22.

Andrews, J.A. (1963) "Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases - 1", *Criminal Law Review*, 15.

Andrews, J.A. (1963) "Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases - 2", *Criminal Law Review*, 77.

Anon. (1964) "An Historical Argument for the Right to Counsel During Police Interrogation", 73 *Yale Law Journal*, 1000.

A Police Officer (1964) "The Judges' Rules and the Police", *Criminal Law Review*, 173.

Ascoli, D. (1979) *The Queen's Peace: The origins and development of the Metropolitan Police 1829-1979*, London: Hamilton.

Ashworth, A.J. (1977) "Excluding evidence as Protecting Rights", *Criminal Law Review*, 723.

- Aubry, A. and Caputo, R. (1965) *Criminal Interrogation*, 2nd edn., 1970, Springfield, Ill.: Thomas.
- Baker, J.H. (1977) "Criminal Courts and Procedure at Common Law", in Cockburn J.S. (ed.) *Crime in England 1550-1800*, London: Methuen.
- Baker, J.H. (1979) *An Introduction to English Legal History*, 2nd edn., London: Butterworths.
- Baker, J.H. (1990) *An Introduction to English Legal History*, 3rd edn., London: Butterworths.
- Baker, T. (1966) *The Normans*, London: Cassell.
- Baldwin, J. and Bedward, J. (1991) "Summarising Tape Recordings of Police Interviews", *Criminal Law Review*, 671.
- Baldwin, J. and McConville, M. (1977) *Negotiated Justice: Pressures to Plead Guilty*, London: Robinson.
- Baldwin, J. and McConville, M. (1979) "Police Interrogation and the Right to see a Solicitor", *Criminal Law Review*, 145.
- Baldwin, J. and McConville, M. (1980) *Confessions in Crown Court Trials*, Royal Commission on Criminal Procedure, Research Study No.5. London: HMSO.

- Baldwin, J. and Moloney, T. (1992) *Supervision of Police Investigation in Serious Criminal Cases*, Royal Commission on Criminal Justice, Research Study No.4. London: HMSO.
- Baldwin, J. (1985) *Pre-Trial Justice: A Study of Case Settlement in Magistrates' Courts*, Oxford: Blackwell.
- Baldwin, J. (1992) *The role of legal representatives at the police station*, Royal Commission on Criminal Justice, Research Study No.3. London: HMSO.
- Baldwin, R. and Kinsey, R. (1982) *Police Powers and Politics*, London: Quartet.
- Barnes, T.G. (1977) "Due Process and Slow Process in the Late Elizabethan - Early Stuart Star Chamber", 6 *American Journal of Legal History*, 221.
- Barry, Sir J.V. (1965) "Police Interrogation" 5 *Sydney Law Review*, 254.
- Bartlett, R. (1988) *Trial by Fire and Water: the Medieval Judicial Ordeal*, Oxford: Clarendon.
- Baxter, J. and Koffman, L. (1983) "The Confait Inheritance - Forgotten Lessons?", 14 *Cambrian Law Review*, 11.
- Beaney, W. (1955) *The Right to Counsel in American Courts*, London: University of Michigan Press.

- Beard, C.A. (1904) *The Office of Justice of the Peace in England*, New York: Columbia University Press.
- Beattie, J.M. (1986) *Crime and the Courts in England 1600-1800*, Oxford: Clarendon.
- Bellamy, J. (1973) *Crime and Public Order in England in the Later Middle Ages*, London: Routledge and Keegan Paul.
- Bellamy, J. (1984) *Criminal Law and Society in Late Medieval and Tudor England*, Gloucester: Sutton.
- Bennun, M.E. (1973) "Defendants Who Fail to Give Evidence", 36 *Modern Law Review*, 554.
- Bentham, J. (1825) *A Treatise on Judicial Evidence*, 2 vols., extracted from the manuscripts of Jeremy Bentham by Dumount, M. London: Baldwin, Cradock and Joy.
- Bentham, J. (1827) *Rationale of Judicial Evidence*, published under the superintendence of John Bowring in *The Works of Jeremy Bentham*, 12 vols., 1843 (vol.7, 1962 edn.). New York: Russell & Russell.
- Benyon, J. and Bourne, C. (eds.) (1986) *The Police*, Oxford: Pergamon.
- Berger, M. (1980) *Taking the Fifth*, Lexington, Mass.: Heath.
- Bevan, V. and Lidstone, K. (1985) *The Police and Criminal Evidence Act 1984*, London: Butterworth.

- Bidderman, A.D. (1960) "Social-Psychological Needs and 'Involuntary' Behaviour as Illustrated by Compliance in Interrogation", 23 *Sociometry*, 120.
- Blackstone, W.S. (1765-1769) *Commentaries on the Laws of England*, 4 vols. Oxford: Clarendon.
- Blumberg A.S. (1967) *Criminal Justice*, 1974 edn., Chicago: Quadrangle.
- Bottoms, A.K. and McClean, J.D. (1976) *Defendants in the Criminal Process*, London: Routledge and Kegan Paul.
- Bowden, T. (1978) *Beyond the Limits of the Law: a comparative study of the police in crisis politics*, Harmondsworth: Penguin.
- Bridges, L. (1994) "Normalising Justice: The Royal Commission on Criminal Justice", in Field, S. and Thomas, P.A. (eds.) *Justice and Efficiency? The Royal Commission on Criminal Justice*, 21 (1) *Journal of Law and Society* (Special Issue).
- Brogden, M. (1982) *The Police: Autonomy and Consent*, London: Academic Press.
- Brogden, M. (1987) "The emergence of the police: the colonial dimension", 27 (1) *British Journal of Criminology*, 4.
- Brogden, M., Jefferson, T., Walklate, S. (1988) *Introducing Policework*, London: Unwin Hyman.
- Brown, D. (1989) *Detention at the Police Station Under the PACE Act*, London: HMSO.

- Brownlie, I. (1960) "Police Questioning, Custody and Caution", *Criminal Law Review*, 298.
- Brownlie, I. (1967) "Police Powers - IV. Questioning: A General View", *Criminal Law Review*, 75.
- Burn, R. (1823) *The Justice of the Peace and Parish Officer*, 23rd edn., with "Supplement" by Chetwynd, G. London: Cadell.
- Bunyan, T. (1977) *The History and Practice of the Political Police in Britain*, London: Quartet.
- Cahill, D. and Mingay, D. (1986) "Leading questions and the police interview", 2 (3) *Policing*, 212.
- Cain, M. (1973) *Society and the Policeman's Role*, London: Routledge.
- Campbell, A.K.A. (1959) "Letters to the Editor", *Criminal Law Review*, 673.
- Chambliss, W.J. (ed.)(1969) *Crime and the Legal Process*, New York: McGraw-Hill.
- Cheyney, E.P. (1913) "The Court of Star Chamber", 18 (4) *American Historical Review*, 727.
- Chibnall, S. (1979) "The Metropolitan Police and the News Media", in Holdaway, S. (ed.) *The British Police*, London: Arnold.
- Chitty, J. (1816) *Practical Treatise on the Criminal Law*, 4 vols, London: Valpy.

- Christian, L. (1983) *Policing By Coercion*, London: GLC Police Committee and Pluto Press.
- Clapp, A.C. (1956) "Privilege Against Self-Incrimination", 10 (3) *Rutgers Law Review*, 541.
- Cockburn, J.S. (1977) "The Nature and Incidence of Crime in England 1559-1625: A Preliminary Survey", in Cockburn, J.S. (ed.) *Crime in England 1550-1800*, London: Methuen.
- Cockburn, J.S. (1978) "Trial by the Book? Fact and Theory in the Criminal Process, 1558-1625", in Baker, J.H. (ed.) *Legal Records and the Historian*, London: Royal Historical Society.
- Cockburn, J.S. and Green, T.A. (eds.) (1988) *Twelve Good Men and True: The Criminal Trial Jury in England, 1200-1800*, Princeton, NJ: Princeton University Press.
- Cohen, P. (1979) "Policing the Working Class City", in Fine, B., Kinsey, R., Lea, J., Piccioto, S. and Young, J. (eds.) *Capitalism and the Rule of Law*, London: Hutchinson.
- Cohen, S.A. (1979) *Due Process of Law*, Toronto, Canada: Carswell.
- Cohen, M. (1981) "Challenging Police Evidence of Interviews and the Second Limb of Section 1 (f) (ii) - Another View", *Criminal Law Review*, 523.
- Commerton, E.A. (1964) "Confessions in the Criminal Law", 15 (2) *Northern Ireland Legal Quarterly*, 166.
- Cornish, W.R. (1968) *The Jury*, London: Allen Lane, Penguin.

- Cornish, W.R. and Clark, G.de N. (1989) *Law and Society in England 1750-1950*, London: Sweet & Maxwell.
- Cornish, W.R. (1978a) "Defects in Prosecuting - Professional views in 1845", in Glazebrook, P.R. (ed.) *Reshaping the Criminal Law*, London: Stevens.
- Cornish, W.R. (1978b) "Criminal Justice and Punishment", in Cornish, W.R., Hart, J., Manchester, A.H. and Stevenson, J. *Crime and Law in Nineteenth Century Britain*, Dublin: Irish University Press.
- Cox, B. (1975) *Civil Liberties in Britain*, Harmondsworth: Penguin.
- Criminal Law Revision Committee, Eleventh Report, *Evidence (General)* Cmnd.4491 (1972) London: HMSO.
- Critchley, T.A. (1966) *A History of Police in England and Wales*, London: Constable.
- Cross, A.R.N. (1970) "The Right to Silence and the Presumption of Innocence - Sacred Cows or Safeguards of Liberty?", 11 *Journal of the Society of Public Teachers of Law*, 66.
- Cross, Sir R. (1973) "A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee", *Criminal Law Review*, 329.
- Cross, Sir R. and Tapper, C. (1985) *Cross on Evidence*, 6th edn. London: Butterworths.
- Damaska, M. (1973) "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study", 121 *University of Pennsylvania Law Review*, 506.

- Damaska, M. (1975) "Structures of Authority and Comparative Criminal Procedure", 84 *Yale Law Journal*, 480.
- Davis, J. (1984) "A Poor Man's System of Justice: The London Police Courts in the Second Half of the Nineteenth Century", 27 (2) *Historical Journal*, 309.
- Deeley, P. (1971) *Beyond Breaking Point: A Study of Techniques of Interrogation*, London: Baker.
- de Gama, K. (1988) "Police Powers and Public Prosecutions: Winning By Appearing To Lose?", 16 *International Journal of the Sociology of Law*, 339.
- Deosaran, R. (1985) *Trial by Jury: Social and Psychological Dynamics*, Trinidad: University of West Indies Press.
- Devlin, P. (1956) *Trial by Jury*, London: Stevens.
- Devlin, P. (1960) *The Criminal Prosecution in England*, Oxford: Oxford University Press.
- Devlin, P. (1966) "The Police in a Changing Society", 57 (2) *Journal of Criminal Law, Criminology and Police Science*, 123.
- Devlin, P. (1979a) *The Judge*, Oxford: Oxford University Press.
- Devlin, P. (1979b) "The Practice of Judging", 101 *Listener*, 441.

- Dixon, D., Bottomley, A.K., Coleman, C.A., Gill, M. and Wall, D. (1989) "Reality and Rules in the Construction and Regulation of Police Suspicion", 17 *Journal of the Sociology of Law*, 185.
- Dixon, D., Bottomley, A.K., Coleman, C.A., Gill, M. and Wall, D. (1990) "Safeguarding the rights of suspects in police custody", 1 (2) *Policing and Society*, 115.
- Dixon, D. (1991a) "Common Sense, Legal Advice and the Right of Silence", *Public Law*, 233.
- Dixon, D. (1991b) "Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act", 20 *Anglo-American Law Review*, 27.
- Douglas, D.C. (1964) *William the Conqueror: The Norman Impact Upon England*, London: Eyre & Spottiswoode.
- Driver, E.D. (1968) "Confessions and the Social Psychology of Coercion", 82 *Harvard Law Review*, 42.
- Easton, S. (1991) *The Right to Silence*, Aldershot: Avebury.
- Elliott, D.W. (1987) *Elliott and Phipson Manual of the Law of Evidence*, 12th edn. London: Sweet & Maxwell.
- Emlyn, S. (1730) *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanours*, London: Walthoe.
- Emsley, C. (1987) *Crime and Society in England, 1750-1900*, London: Longman.

- Emsley, C. (1983) *Policing and its Context, 1750-1870*, London: Macmillan.
- Emsley, C. (1991) *The English Police: A Political and Social History*, Hemel Hempstead: Harvester Wheatsheaf.
- Elton, G.R. (ed.) (1960) *The Tudor Constitution: Documents and Commentary*, (2nd edn. 1982) Cambridge: Cambridge University Press.
- Evans, R. (1993) *The Conduct of Police Interviews with Juveniles*, Royal Commission on Criminal Justice, Research Study No.8. London: HMSO.
- Fellman, D. (1966) *The Defendant's Rights Under English Law*, London: University of Wisconsin Press.
- Finn, R.W. (1973) *Domesday Book: A Guide*, London: Phillimore.
- Firth, A. (1976) "Interrogation", *Police Review* (No.4324), 1507.
- Foster, H. (1979) "Trial by Jury: the Thirteenth-Century Crisis in Criminal Procedure", 13 (2) *University of British Columbia Law Review*, 280.
- Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, London: Allen Lane.
- Freeman, M.D.A. (1985) *The Police and Criminal Evidence Act 1984*, London: Sweet & Maxwell.

- Freestone, D. and Richardson, J.C. (1980) "The Making of English Criminal Law: (7) Sir John Jervis and his Acts", *Criminal Law Review*, 5.
- Fry T.P. (1938) "Admissibility of Statements made by Accused Persons", 11 *Australian Law Journal*, 425.
- Garfinkel, H. (1956) "Conditions of Successful Degradation Ceremonies", 61 (5) *American Journal of Sociology*, 420.
- Gatrell, V.A.C. (1990) "Crime, authority and the policeman-state", in Thompson, F.L.M. (ed.) *The Cambridge Social History of Britain 1750-1950, Vol.3: Social agencies and institutions*, Cambridge: Cambridge University Press.
- Gernstein, R.S. (1979) "The Self-Incrimination Debate in Great Britain", 27 *American Journal of Comparative Law*, 81.
- Gilbert, G. (1760) *The Law of Evidence by a Late Learned Judge*, 2nd edn. London: Owen.
- Glasbeek, H. and Prentice, D. (1968) "The Criminal Suspect's Illusory Right of Silence in the British Commonwealth", 53 *Cornell Law Quarterly*, 473.
- Glazebrook, P. (1977) "The Making of English Law: (3) The Reign of Mary Tudor", *Criminal Law Review*, 582.
- Goldstein, A.S. (1960) "The State and the Accused: Balance of Advantage in Criminal Procedure", 69 *Yale Law Journal*, 1149.

- Goldstein, A.S. (1974) "Reflections on Two Models: Inquisitional Themes in American Criminal Procedure", 26 *Stanford Law Review*, 1009.
- Gooderson, R.N. (1970) "The Interrogation of Suspects" 48 *Canadian Bar Review*, 270.
- Gordon, P. (1983) *White Law: Racism in the Police, Courts and Prisons*, London: Pluto.
- Grano, J.D. (1979) "Voluntariness, Free Will and the Law of Confessions", 65 *Virginia Law Review*, 859.
- Greaves, H.R.G (1936) *Reactionary England*, London: Acorn.
- Green, T.A. (1985) *Verdict According to Conscience: Perspectives on the English Jury Trial 1200-1800*, London: University of Chicago Press.
- Green, T.A. (1988) "A Retrospective in the Criminal Trial Jury, 1200-1800", in Cockburn, J.S. and Green, T.A. (eds.)
- Greenwalt, K. (1974) "Perspectives On the Right to Silence", in Hood, R. (ed.) *Crime, Criminology and Public Policy*, London: Hienemann.
- Greer, S. (1994) "The Right to Silence, Defence Disclosure, and Confession Evidence", in Field, S. and Thomas, P.A. (eds.)
- Griew, E. (1961) "Imputations on the Character of the Prosecutor or the Witness for the Prosecution - A Restatement", *Criminal Law Review*, 142, 213.

- Griffiths, J. (1970) "Ideology in Criminal Procedure or A Third 'Model' of the Criminal Process", 79 (3) *Yale Law Journal*, 359.
- Griffiths, J. and Ayres, R.E. (1967) "A postscript to the Miranda project: Interrogation of draft protesters", 77 (2) *Yale Law Journal*, 300.
- Groot, R.M. (1988) "The Early-Thirteenth-Century Criminal Jury", in Cockburn, J.S. and Green, T.A. (eds.)
- Gudjonsson, G. and Clark, N. (1988) "Suggestibility in police interrogation: a social, psychological model", 1 *Social Behaviour*, 83.
- Gudjonsson, G. and MacKeith, J. (1988) "Retracted Confessions: legal, psychological and psychiatric aspects", 28 (3) *Medicine, Science and the Law*, 187.
- Gudjonsson, G.H. (1992) *The Psychology of Interrogations, Confessions and Testimony*, Chichester: Wiley.
- Guy, J.A. (1985) *The Court of Star Chamber and its Records to the Reign of Elizabeth I*, London: HMSO.
- Hale, M. (1678) *Pleas of the Crown*, London: Tonson.
- Hale, M. (1739) *The History of the Common Law of England*, 1971 edn. Gray, C. (ed.) Chicago: University of Chicago Press.
- Harding, A. (1966) *A Social History of English Law*, Harmondsworth: Penguin.

Harding, A. (1973) *The Law Courts of Medieval England*, London: Allen & Unwin.

Hart, J. (1978) "Police", in Cornish *et al.*, *Crime and Law in Nineteenth Century Britain*, Dublin: Irish University Press.

Hay, D. (1975) "Property, authority and the criminal law", in Hay, D., Linebaugh, P. and Thompson, E.P. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, London: Allen Lane.

Hay, D. (1983) "Controlling the English prosecutor", 21 (2) *Osgoode Hall Law Journal*, 165.

Hay, D. (1988) "The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century", in Cockburn and Green (eds.)

Hay, D. and Snyder, F. (eds.) (1989) *Policing and Prosecution in Britain 1750-1850*, Oxford: Clarendon.

Hay, D. and Snyder, F. (1989) "Using the Criminal Law, 1750-1850: Policing, Private Prosecution, and the State", in Hay, D. and Snyder, F. (eds.)

Heydon J.D. (1976) "Confessions and Silence", *Sydney Law Review*, 375.

Hiemstra, V.G. (1963) "Abolition of the Right Not to be Questioned", 80 *South African Law Journal*, 187.

Hoffman (1964) "The Judges' Rules" 7 *Lawyer*, 23.

Holdaway, S. (ed.) (1979) *The British Police*, London: Arnold.

Holdaway, S. (1983) *Inside the British Police: A Force at Work*, Oxford: Basil Blackwell.

Holdsworth, W.S. (1903-1966) *A History of English Law*, 16 vols. London : Methuen/Sweet & Maxwell.

Horowitz, G. (1958) "The Privilege against Self-Incrimination: How Did It Originate", 31 *Temple Law Quarterly*, 121.

Howard, A. (ed.) (1965) *Criminal Justice in Our Time*, Virginia: University of Virginia Press.

Howard, P. (1931) *Criminal Justice in England*, New York: Macmillan.

Hurnard, N.D. (1941) "The Jury of Presentment and the Assize of Clarendon", 56 *English Historical Review*, 374.

Ignatieff, M. (1979) "Police and People: The Birth of Mr Peel's 'Blue Locusts'", *New Society*, 443.

Inbau, F. and Reid, J. (1962) *Criminal Interrogation and Confessions*, 2nd edn., 1967, Baltimore: Williams & Wilkins.

Inman, M. (1981) "The Admissibility of Confessions", *Criminal Law Review*, 469.

Irving, B. and Hilgendorf, L. (1980) *Police Interrogation: The Psychological Approach*, Royal Commission on Criminal Procedure, Research Study No.1. London: HMSO.

- Irving, B. (1980) *Police Interrogation: A Case Study of Current Practice*, Royal Commission on Criminal Procedure, Research Study No.2. London: HMSO.
- Irving, B. and McKenzie, I. (1987) "Police Interrogation; the effects of PACE", 3 (1) *Policing*, 4.
- Irving, B. and McKenzie, I. (1988) *Regulating Custodial Interviews*, London: Police Foundation.
- Irving, B. and McKenzie, I. (1989*) "Interrogating in a legal framework", in Morgan, R. and Smith, D.J. (eds.) *Coming to terms with policing*, London: Routledge.
- Irving, B. and McKenzie, I. (1989*) *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984*, London: Police Foundation.
- Jackson, R.M. (1967) *The Machinery of Justice in England*, 5th edn., Cambridge: Cambridge University Press.
- Jackson, R.M. (1972) *Enforcing the Law*, Middlesex: Penguin.
- Jackson, J.D. (1979) "Confessions and the Doctrine of Oppression", *New Law Journal*, 264.
- Jackson, J.D. (1986) "In Defence of a Voluntariness Doctrine for Confessions: *The Queen v. Johnston* Revisited", 21 (1) *Irish Jurist*, 208.
- Jardine, D. (1837) *A Reading on the Use of Torture in the Criminal Law of England*, London: Baldwin & Cradock.

**PAGE
MISSING
IN
ORIGINAL**

- Langbein, J.H. (1979) "Understanding the Short History of Plea Bargaining", 13 *Law and Society Review*, 261.
- Langbein, J.H. (1982) "Albion's Fatal Flaws", 98 *Past and Present*, 96.
- Langbein, J.H. (1983) "Shaping the Eighteenth-Century Criminal Trial, A View from the Ryder Sources", 50 (1) *University of Chicago Law Review*, 1.
- Lawson, P.G. (1988) "Lawless Juries? The Composition and Behaviour of Hertfordshire Juries, 1573-1624", in Cockburn, J.S. and Green, T.A. (eds.)
- Leadam, I.S. and Baldwin, J.F. (eds.) (1918) *Select Cases Before the King's Council, 1243-1482*, Selden Society, vol.35. Cambridge, Mass.: Harvard University Press.
- Lee, W.L.M. (1901) *A History of Police in England*, London: Methuen.
- Leigh, L.H. (1975) *Police Powers in England and Wales*, London: Butterworths.
- Leigh, L.H. (1985) *Police Powers in England and Wales*, 2nd edn., London: Butterworths.
- Leigh, L.H. (1986) "Some Observations on the Parliamentary History of the Police and Criminal Evidence Act 1984", in Harlow, C. (ed.) *Public Law and Politics*, London: Sweet & Maxwell.
- Leo, R.A. (1994) "Police Interrogation and Social Control", 3 (1) *Social and Legal Studies*, 93.

- Leng, R. (1993) *The right to silence in police interrogation: a study of some of the issues underlying the debate*, Royal Commission on Criminal Justice, Research Study No.10. London: HMSO.
- Lewis, D. and Hughman, P. (1975) *Just How Just*, London: Secker & Warburg.
- Levy, L.W. (1968) *Origins of the Fifth Amendment: the Right Against Self-Incrimination*, New York: Oxford University Press.
- Lidstone, K. (1981) "Investigative Powers and the Rights of the Citizen", *Criminal Law Review*, 454.
- Lidstone, K. and Early T. (1982) "Questioning Freedom: Detention for Questioning in France, Scotland and England", 31 *International and Comparative Law Quarterly*, 488.
- Lipton, J. (1977) "On the psychology of eyewitness testimony", 62 (1) *Journal of Applied Psychology*, 90.
- Lowell, A.L. (1897-8) "The Judicial Use of Torture", parts I and II, 11 *Harvard Law Review*, 220 and 290.
- Loyn, H.R. (1962) *Anglo-Saxon England and the Norman Conquest*, New York: Longman.
- Lustgarten, L. (1986) *The Governance of the Police*, London: Sweet & Maxwell.
- MacDermott, Lord. (1957) *Protection from Power Under English Law*, London: Stevens.

MacDermott, Lord. (1968) "The Interrogation of Suspects in Custody", 21 *Current Legal Problems*, 1.

MacDonald, T.D. and Hart, A.H. (1947) "The Admissibility of Confessions in Criminal Cases", 25 *Canadian Bar Review*, 823.

MacKay, P. (1990) "Changes in Custody Practice Since the Introduction of the Police & Criminal Evidence Act 1984", 14 (2) *The Criminologist*, 63.

MacKenna, Sir B. (1970) "Police Interrogation" 120 *New Law Journal*, 665.

MacKenna, Sir B. (1972) "Criminal Law Revision Committee's Eleventh Report: Some Comments", *Criminal Law Review*, 605.

MacNair, M.R.T. (1990) "The Early Development of the Privilege against Self-Incrimination", 10 *Oxford Journal of Legal Studies*, 66.

Maguire, M.H. (1936) "Attack of the Common Lawyers on the Oath *ex officio* as Administered in the Ecclesiastical Courts of England", in Wittke (ed.) *Essays in History and Political Theory in Honour of Charles Howard McIlwain*, Cambridge, Mass.: Harvard University Press.

Maguire, M. (1988) "The Effects of the PACE Provisions in Detention and Questioning", 28 *British Journal of Criminology*, 19.

Maguire, M. and Norris, C. (1992) *The Conduct and Supervision of Criminal Investigations*, Royal Commission on Criminal Justice, Research Study No.5. London: HMSO.

- Maguire, M. and Norris, C. (1994) "Police Investigations: Practice and Malpractice", in Field, S. and Thomas, P.A. (eds)
- Maitland, F.W. (1885) *Justice and Police*, London: Macmillan.
- Maitland, F.W. (1908) *The Constitutional History of England*, (1963 reprint) Cambridge: Cambridge University Press.
- Manchester, A.H. (1980) *A Modern Legal History of England and Wales 1750-1950*, London: Butterworths.
- Manchester, A.H. (1984) *Sources of English Legal History 1750-1950*, London: Butterworths.
- Manning, P.K. (1977) *Police Work: The Social Organisation of Policing*, Cambridge, Mass.: MIT.
- Mark, R. (1966) "A Matter of Conviction", *Criminal Law Review*, 311.
- Mark, R. (1973) *Minority Verdict*, the 1973 Dimbleby Lecture, London: BBC.
- Mark, R. (1977) *Policing a Perplexed Society*, London: Allen & Unwin.
- Mark, R. (1978) *In the Office of Constable*, London: Collins.
- Marquis, K., Marshall, J. and Oskamp, S. (1972) "Testimonial validity as a function of question form, atmosphere, and item difficulty", 2 (2) *Journal of Applied Psychology*, 167.

Marshall, G. (1964) "Comment" *Public Law*, 97.

McBarnet, D.J. (1976) "Pre-trial Procedures and the Construction of Conviction", in Carlen, P. (ed.) *Sociological Review Monograph: The Sociology of Law*, Keele University.

McBarnet, D.J. (1978) "The Fisher Report on the Confait Case: Four Issues", 41 *Modern Law Review*, 455.

McBarnet, D.J. (1981a) "Balance and clarity: has the Royal Commission achieved them?", *Criminal Law Review*, 445.

McBarnet, D.J. (1981b) *Conviction: Law, the State and the Construction of Justice*, London: Macmillan.

McBarnet, D.J. (1981c) "The Royal Commission and the Judges' Rules", 8 (1) *British Journal of Law and Society*, 109.

McConville, M. and Baldwin, J. (1980) "Confessions: The Dubious Fruits of Police Interrogation", 130 (2) *New Law Journal*, 993.

McConville, M. and Baldwin, J. (1981) *Courts, Prosecution and Conviction*, Oxford: Clarendon.

McConville, M. and Baldwin, J. (1982a) "Recent Developments in English Criminal Justice and the Royal Commission on Criminal Procedure", 10 *International Journal of the Sociology of Law*, 287.

- McConville, M. and Baldwin, J. (1982b) "The Role of Interrogation in Crime Discovery and Conviction", 22 (1) *British Journal of Criminology*, 165.
- McConville, M. and Hodgson, J. (1993) *Custodial Advice and the Right to Silence*, Royal Commission on Criminal Justice, Research Study No.16. London: HMSO.
- McConville, M. and Morrel, P. (1983) "Recording the Interrogation: Have the Police got it Taped?", *Criminal Law Review*, 158.
- McConville, M. (1984) "Prosecuting Criminal Cases in England and Wales: Reflections of an Inquisitorial Adversary", 6 (1) *Liverpool Law Review*, 15.
- McConville, M. (1992) "Videotaping interrogations: Police behaviour on and off camera", *Criminal Law Review*, 532.
- McConville, M. (1993) *Corroboration and Confessions. The impact of a rule requiring that no conviction can be sustained on the basis of confession evidence alone*, Royal Commission on Criminal Justice, Research Study No.13. London: HMSO.
- McConville, M., Sanders, A. and Leng, R. (1991) *The Case For the Prosecution*, London: Routledge.
- McConville, M., Hodgson, J., Bridges, L and Pavlovic, A. (1994) *Standing Accused: The Organisation of Criminal Defence Lawyers in Britain*, Oxford: Clarendon.
- McCormick, C.T. (1938) "The Scope of Privilege in the Law of Evidence", 16 (4) *Texas Law Review*, 447.

- McCormick, C.T. (1946) "Some Problems and Developments in the Admissibility of Confessions", 24 (3) *Texas Law Review*, 239.
- McEwan, J. (1992) *Evidence and the Adversarial Process: The Modern Law*, Oxford: Blackwell.
- McLain, B.W. (1988) "Juror Attitudes toward Local Disorder: The Evidence of the 1328 Trailbaston Proceedings", in Cockburn, J.S and Green, T.A. (eds.)
- McNaughton, J. (1960) "The privilege against self-incrimination - its constitutional affectation, raison d'etra and miscellaneous implications", 51 *Journal of Criminal Law, Criminology and Police Science*, 138.
- McNee, D. (1979) "Policing in Modern Britain", in Stott and Miller (eds.) *Crime and the Responsible Community*, London: Hodder & Stoughton.
- McNee, D. (1983) *McNee's Law*, London: Collins.
- Mead, F. (1935) "Cautions", 99 *Justice of the Peace and Local Government Review*, 499.
- Menlowe, M. (1988) "Bentham, self-incrimination and the law of evidence," 104 *Law Quarterly Review*, 286.
- Miller, C.J. (1973) "Silence and Confessions - What are they worth?", *Criminal Law Review*, 343.

- Miller, W.R. (1977) *Cops and Bobbies: Police Authority in New York and London, 1830-1870*, Chicago: Chicago University Press.
- Milton, F. (1967) *The English Magistracy*, London: Oxford University Press.
- Mirfield, P. (1981) "Confessions - the 'Person in Authority' Requirement", *Criminal Law Review*, 92.
- Mirfield, P. (1985) *Confessions*, London: Sweet & Maxwell.
- Moir, E. (1969) *The Justice of the Peace*, Harmondsworth: Penguin.
- Monkkonen, E.H. (1981) *Police in Urban America, 1860-1920*, Cambridge: Cambridge University Press.
- Moreland, R. (1956) "Historical Background and Implications of the Privilege Against Self-Incrimination", 54 *Kentucky Law Journal*, 267.
- Morgan, E. (1949) "The privilege against self-incrimination", 34 (1) *Minnesota Law Review*, 1.
- Morgan, J. (1990) *The Police Function and the Investigation of Crime*, Aldershot: Avebury.
- Morgan, R. and Smith, D.J. (eds.) (1989) *Coming to terms with policing*, London: Routledge.
- Morris, P. (1980) *Police Interrogation: Review of Literature*, Royal Commission on Criminal Procedure, Research Study No.3. London: HMSO.

- Morton, J. (1972) "The Rights of the Suspect", 122 *New Law Journal*, 805.
- Morton, J. (1975) "To Combat Verbals", 125 *New Law Journal*, 830.
- Morton, J. (1993) *Bent Coppers: A Survey of Police Corruption*, London: Little, Brown.
- Moston, S., Stephenson, G.M. and Williamson, T.M. (1992) "The Effects of Case Characteristics on Suspect Behaviour During Police Questioning", 32 *British Journal of Criminology*, 23.
- Moston, S. and Stephenson, G.M. (1993a) "The Changing Face of Police Interrogation", 3 *Journal of Community & Applied Social Psychology*, 101.
- Moston, S. and Stephenson, G.M. (1993b) *The Questioning and Interviewing of Suspects Outside the Police Station*, Royal Commission on Criminal Justice, Research Study No.22. London: HMSO.
- Mummery, D.R. (1981) "Due Process and Inquisition", 97 *Law Quarterly Review*, 287.
- Neasey, F.M. (1969) "The Rights of the Accused and the Interests of the Community", 43 *Australian Law Journal*, 482.
- Neasey, F.M. (1977) "The Right to Remain Silent", 51 *Australian Law Journal*, 360.
- Noble, R. (1970) "The Struggle to Make the Accused Competent in England and Canada", 8 (2) *Osgoode Hall Law Journal*, 249.

- Oaks, D. (1970) "Studying the Exclusionary Rule in Search and Seizure", 37 *University of Chicago Law Review*, 665.
- O'Connor, P. and Cooney, T. (1980) "Criminal Due Process, the Pre-Trial Stage and Self-Incrimination", 15 *Irish Jurist*, 219.
- Odgers, S. (1985) "Police Interrogation and the Right to Silence", 59 *Australian Law Review*, 78.
- O'Donoghue, F. (1966) "Imputations on the Character of Prosecution Witnesses", 29 *Modern Law Review*, 492.
- O'Hara, C.E. (1956) *Fundamentals of Criminal Investigation*, 2nd edn., 1970, Springfield, Ill.: Thomas.
- O'Regan, R. (1965) "Adverse Inferences from Failure of an Accused Person to Testify", *Criminal Law Review*, 711.
- Osborne, B. (1960) *Justices of the Peace 1361-1848*, Dorset: Sedghill.
- Packer, H. (1964) "Two Models of the Criminal Process", 113 (1) *University of Pennsylvania Law Review*, 1.
- Packer, H. (1968) *The Limits of the Criminal Sanction*, Stanford: Stanford University Press.
- Packman, I.V. (1959) "Letters to the Editor", *Criminal Law Review*, 675.

- Parker, G. (1984) "The prisoner in the box - the making of the Criminal Evidence Act, 1898", in J.A. Guy and H.G. Beale (eds.), *Law and Social Change in British History*, London: Royal Historical Society.
- Pattenden, R. (1981) "The Purpose of Cross-Examination Under Section 1 (f) of the Criminal Evidence Act 1898", *Criminal Law Review*, 707.
- Pattenden, R. (1982) *The Judge, Discretion and the Criminal Trial*, Oxford: Oxford University Press.
- Pattenden, R. (1991) "Should Confessions be Corroborated" 107 *Law Quarterly Review*, 317.
- Payne, G.C. (1959) "Letters to the Editor", *Criminal Law Review*, 675.
- Pepinski, H.E. (1970) "A Theory of Police Reaction to Miranda v. Arizona", 16 *Crime and Delinquency*, 379.
- Peters, E. (1985) *Torture*, Oxford: Blackwell.
- Phillips, D. (1977) *Crime and Authority in Victorian England*, London: Croom Helm.
- Phillips, D. (1989) "Good Men to Associate and Bad Men to Conspire: Associations for the Prosecution of Felons in England, 1750-1850", in Hay, D. and Snyder, F. (eds.)
- Phillips, H.E.I. (1939) "The Last Years of the Star Chamber, 1630-41", 21 *Transactions of the Royal Historical Society*, (4th Series) 103.

- Phillips, H.E.I. (1941) "The Court of Star Chamber, 1603-1641, with Special Reference to the Period 1625-41", 18 (52) *Bulletin of the Institute of Historical Research*, 35.
- Pitt-Lewis, G. (1896) "A Bill for the Protection of Innocent Prisoners", 39 (231) *Nineteenth Century*, 812.
- Pittman, R.C. (1939) "The Colonial and Constitutional History of the Privilege against Self-Incrimination in America", 21 *Virginia Law Review*, 763.
- Ploscowe, M. (1935) "The Development of Present-Day Criminal Procedures in Europe and America", 48 *Harvard Law Review*, 433.
- Plucknett, T.F.T. (1956) *A Concise History of the Common Law*, 5th edn., London: Butterworth.
- Pollock F.M. and Maitland, F.W. (1898) *The History of English Law Before the Time of Edward I*, 2 vols., (2nd edn., 1911) Cambridge: Cambridge University Press.
- Post, J.B. (1985) "The Admissibility of Defence Counsel in English Criminal Procedure", in Kiralfy, A., Slatter, M. and Virgoe, R. (eds.) *Custom, Courts and Counsel*, London: Cass.
- Postema, G. (1977) "The Principle of Utility and the law of procedure: Bentham's theory of adjudication", 11 *Georgia Law Review*, 1393.
- Pound, R. (1934) "Legal Interrogation of Persons Accused or Suspected of Crime", 24 *Journal of Criminal Law and Criminology*, 1014.

- Powell, E. (1989) *Kingship, Law, and Society: Criminal Justice in the Reign of Henry V*, Oxford: Clarendon.
- Powers, P., Andriks, J. and Loftus, E. (1979) "Eyewitness Accounts of Females and Males", 64 (3) *Journal of Applied Psychology*, 399.
- Pue, W.W. (1983) "The Criminal Twilight Zone: Pre-Trial Procedures in the 1840s", 21 (1) *Alberta Law Review*, 335.
- Punch, M. (ed.) (1983) *Control in the Police Organisation*, Cambridge Mass.: MIT.
- Putnam, B.H. (ed.) (1924) *Early Treatises on the practice of the Justices of the Peace in the Fifteenth and Sixteenth Centuries*, 7 Oxford Studies in Social and Legal History, Oxford: Oxford University Press.
- Ratushny E. (1971) "Unravelling Confessions", 13 *Criminal Law Quarterly*, 453.
- Ratushny, E. (1979) *Self-Incrimination in the Canadian Criminal Process*, Toronto: Carswell.
- Reiner, R. (1980) Fuzzy Thoughts: The Police and Law-and-Order Politics", 28 (2) *Sociological Review*, 377.
- Reiner, R. (1983) "The Politicization of the Police in Britain", in Punch, M. (ed.) *Control in the Police Organisation*, Cambridge Mass.: MIT.
- Reiner, R. (1985) *The Politics of the Police*, Brighton: Wheatsheaf.

Reiner, R. (1986) "The Modern Bobby", (4) *Policing*, 258.

Report, by J Sott Henderson QC, of an Inquiry into Certain Matters arising out of the Deaths of Mrs Beryl Evans and of Geraldine Evans and out of the Conviction of Timothy John Evans of the Murder of Geraldine Evans, Cmd.8896, 1953, London: HMSO.

Report of the Royal Commission on Police Powers and Procedure, Cmd.3297, 1929, London: HMSO.

Report of the Royal Commission upon the Duties of the Metropolitan Police, cd.4156, 1908, London: HMSO.

Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence on Identification in Criminal Cases, 1976, London: HMSO.

Report of an Inquiry by the Hon. Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6, 1977, London: HMSO.

Report of an Inquiry by the Hon. Mr Justice Brabin into the case of Timothy John Evans, Cmmd.3101, 1966, London: HMSO.

Roberts, S.K. (1988) "Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-4670", in Cockburn, J.S. and Green, T.A. (eds.)

Rothblatt, H. and Rothblatt, E. (1960) "Police Interrogation: The Right to Counsel and to Prompt Arraignment" 28 *Brooklyn Law Review*, 24.

- Royal, R. and Schutt, S. (1976) *The Gentle Art of Interviewing and Interrogation: Professional Manual and Guide*, Englewood Cliffs, NJ: Prentice Hall.
- Royal Commission on the Police, (1962) *Final Report*, Cmnd.1728, London: HMSO.
- Royal Commission on Criminal Procedure, (1981) *Report*, Cmnd.8092, London: HMSO.
- Royal Commission on Criminal Procedure, (1981) *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure*, Cmnd.8092-1, London: HMSO.
- Royal Commission on Criminal Procedure, (1981) *The Balance of Criminal Justice*, London: HMSO.
- Royal Commission on Criminal Justice, (1993) *Report*, Cm.2263, London: HMSO.
- Sanders, A. (1987) "Constructing the Case for the Prosecution", 14 (2) *Journal of Law and Society*, 229.
- Sanders, A. (1988) "The Limits to Diversion From Prosecution", 28 (4) *British Journal of Criminology*, 513.
- Sanders, A., Bridges, L., Mulvaney, A. and Crozier, G. (1989) *Advice and Assistance at Police Stations and the 24 Hour Duty Solicitor Scheme*, London: Lord Chancellor's Department.

- Sanders, A. and Bridges, L. (1990) "Access to Legal Advice and Police Malpractice", *Criminal Law Review*, 494.
- Sargant, W. (1957) *Battle for the Mind*, London: Heinemann.
- Schaefer, W. (1966) "Police Interrogation and the Privilege Against Self-Incrimination", 61 (4) *North Western University Law Review*, 506.
- Scruton, P. (1985) *The State of the Police*, London: Pluto.
- Sheffield Police Appeal Inquiry* (1963) Cmnd.2176. London: HMSO.
- Sigler, J.A. (1974) "Public Prosecutions in England and Wales", *Criminal Law Review*, 642.
- Silver, A. (1967) "The Demand for Order in Civil Society: A Review of Some Themes in the History of Urban Crime, Police and Riot", in Bordua, D.J. (ed.) *The Police: Six Sociological Essays*, New York: Wiley.
- Skyrine, T. (1979) *The Changing Image of the Magistracy*, London: Macmillan.
- Smith, J.C. (1959) "Letters to the Editor", *Criminal Law Review*, 677.
- Smith, J.C. (1960) "Questioning by the Police: Some Further Points - 2", *Criminal Law Review*, 347.
- Smith, J.C. (1964) "The New Judges' Rules - A Lawyer's View", *Criminal Law Review*, 176.

- Smith, D.J. and Gray, J. (1983) *Police and the People in London IV: The Police in Action*, London: Policy Studies Institute, No.621.
- Softley, P. (1980) *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure, Research Study No.4. London: HMSO.
- Staunford, W. (1607) *Pleas of the Crown*, London: Honyman.
- Stead, P.J. (1985) *The Police of Britain*, London: Macmillan.
- Steer, D. (1980) *Uncovering Crime: The Police Role*, Royal Commission on Criminal Procedure, Research Study No.7. London: HMSO.
- Stephen, H. (1896) "A Bill to Promote the Conviction of Innocent Prisoners", 30 *Nineteenth Century*, 566.
- Stephen, H. (1898) *Prisoners on Oath*, London: Heinemann.
- Stephen, J.F. (1877) "Suggestions as to the Reform of the Criminal Law", 2 (10) *Nineteenth Century*, 737.
- Stephen, J.F. (1883) *A History of the Criminal Law of England*, 3 vols., London: Macmillan.
- Stephen, J.F. (1886) "Prisoners as Witnesses", 20 (116) *Nineteenth Century*, 453.
- Stephenson, C. and Marcham, F.G. (eds) (1937) *Sources of English Constitutional History*, New York: Harper & Row.

- Stephenson, G.M. (1990) "Should collaborative testimony be permitted in courts of law?", *Criminal Law Review*, 302.
- St.Johnston, T.E. (1948) "The Legal Limitation of the Interrogation of Suspects and Prisoners in England and Wales", 39 *American Journal of Police Science*, 89.
- St.Johnston, T.E. (1966) "The Judges' Rules and Police Interrogation in England and Wales", 57 *Journal of Criminal Law and Police Science*, 85.
- Stone, J. (1935) "Cross-Examination by the Prosecution at Common Law and under the Criminal Evidence Act, 1898", 49 *Law Quarterly Review*, 443.
- Stone, J. (1942) "Further problems in the interpretation of the Criminal Evidence Act, 1898, s.1, proviso (f)", 58 *Law Quarterly Review*, 369.
- Storch, R.D. (1975) "The Plague of Blue Locusts: Police Reform and Popular Resistance in Northern England 1840-1857, 20 (1) *International Review of Social History*, 61.
- Storch, R.D. (1976) "The Policeman as Domestic Missionary: Urban Discipline and Popular Culture in Northern England 1850-1880", 9 (4) *Journal of Social History*, 481.
- Summerson, H. (1983) "The Early Development of the Pein Forte et Dure", in Ives, E. and Manchester, A. (eds.) *Law, Litigants and the Legal Profession*, London: Royal Historical Society.
- Tapper, C. (1990) *Cross on Evidence*, 7th edn. London: Butterworths.

Taylor, P. (1864) *A Treatise on the Law of Evidence*, 4th edn, London: Maxwell.

Teh, G.L. (1972) "An Examination of the Judges' Rules in Australia", 46 *Australian Law Journal*, 489.

Teh, G.L. (1973) "The Criminal Suspect's Right to Silence: A Hallowed Shibboleth", 4 *University of Tasmania Law Review*, 113.

Thayer, J.B. (1898) *A Preliminary Treatise on Evidence at the Common Law*, Boston: Little, Brown.

Thomas, D.A. (1964) "The Revised Judges' Rules", 4 (4) *British Journal of Criminology*, 383.

Thomas, T. (1987) "The Confait Confessions", 3 (3) *Policing*, 214.

Thompson, D. (1967) "Questioning: A Comment", *Criminal Law Review*, 94.

Thompson, E.P. (1975) *Wigs and Hunters: The Origin of the Black Act*, London: Alan Lane.

Tribunal of Inquiry in Regard to the Interrogation by the Police of Miss Savidge (1928)
Cmnd.3147.

Usher, R.G. (1913) *The Rise and Fall of the High Commission*, Oxford: Clarendon.

Van Caenegem, R.C. (1973) *The Birth of the English Common Law*, 2nd edn., 1988,
Cambridge: Cambridge University Press.

- Veall, D. (1970) *The Popular Movement for Law Reform, 1640-1660*, Oxford: Clarendon.
- Vincent, H. (1931) *Vincent's Police Code and General Manual of the Criminal Law*, 17th edn. London: Butterworth.
- Waldman, T. (1959) "Origins of the legal doctrine of reasonable doubt", 20 *Journal of the History of Ideas*, 299.
- Walker, R.J. (1976) *The English Legal System*, 4th edn. London: Butterworth.
- Walkley, J. (1987) *Police Interrogation, a handbook for investigators*, London: Police Review.
- Walsh, D.P.J. (1982) "Arrest and Interrogation: Northern Ireland 1981", 9 (1) *Journal of Law and Society*, 37.
- Weinberger, B. (1991) "Are the Police Professionals? An Historical Account of the Police Institution", in Emsley, C. and Weinberger, B. (eds.) *Policing in Western Europe*, London; Greenwood.
- Wells, C.I. (1911) "Origin of the petty jury", 27 *Law Quarterly Review*, 347.
- Western, P. (1974) "The Compulsory Process Clause", 73 (7) *Michigan Law Review*, 71.
- Whitaker, B. (1964) *The Police*, London: Eyre Methuen.
- Whitaker, B. (1979) *The Police in Society*, London: Eyre Methuen.

Wigmore, J.H. (1891) "Nemo Tenetur Prodere Seipsum", 5 *Harvard Law Review*, 71.

Wigmore, J.H. (1902) "The Privilege Against Self-Incrimination; Its History", 15 *Harvard Law Review*, 610.

Wigmore, J.H. (1935) "Cross-Examination by the Prosecution at Common Law and Under the Criminal Evidence Act, 1898", *Law Quarterly Review*, 443.

Wigmore, J.H. (1940-1979) *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 10 Vols., vol.3, revised by Chadbourn, J.H. (1970); vol.8, revised by McNaughton, J.T. (1961). Boston: Little, Brown.

Williams, C. (1960) "Questioning by the Police: Some Further Points - 2", *Criminal Law Review*, 352.

Williams, C. (1983) "Judicial Discretion in Relation to Confessions", 3 *Oxford Journal of Legal Studies*, 222.

Williams, E. (1914) "The Modern View of Confessions", 30 *Law Quarterly Review*, 292.

Williams, G. (ed.) (1951) *The Reform of the Law*, London: Victor Gollancz.

Williams, G. (1955) "Evidence Obtained by Illegal Means", *Criminal Law Review*, 339.

Williams, G. (1960a) "Questioning by the Police: Some Practical Considerations", *Criminal Law Review*, 325.

- Williams, G. (1960b) "The Privilege Against Self-Incrimination Under Foreign Law: England", 51 *Journal of Criminal Law, Criminology and Police Science*, 166.
- Williams, G. (1961) "Police Interrogation in England" 52 *Journal of Criminal Law Criminology and Police Science*, 50.
- Williams, G. (1963) *The Proof of Guilt*, 3rd edn., London: Stevens.
- Williams, G. (1979) "The Authentication of Statements to the Police", *Criminal Law Review*, 6.
- Wills, A. (1878) "Should Prisoners be Examined?" 3 (11) *Nineteenth Century*, 169.
- Woffinden, B. (1987) *Miscarriages of Justice*, London: Hodder & Stoughton.
- Wolchover, D. (1981) "Cross-Examination of the Accused on his Record when a Confession is Denied or Retracted", *Criminal Law Review*, 312.
- Wolchover, D. and Heaton-Armstrong, A. (1991) "The questioning code revamped", *Criminal Law Review*, 232.
- Zander, M. (1972) "Access to a solicitor in the police station", *Criminal Law Review*, 342.
- Zander, M. (1974) "The CLRC Evidence Report - A Survey of Reactions", 71 *Law Society's Gazette*, 954.

Zander, M. (1977) "The Criminal Process - a subject ripe for a major inquiry", *Criminal Law Review*, 249.

Zander, M. (1979) "The investigation of crime: a study of cases tried at the Old Bailey", *Criminal Law Review*, 203.

Zander, M. (1985) *The Police and Criminal Evidence Act 1984*, London: Sweet & Maxwell.

Zander, M. (1990) *The Police and Criminal Evidence Act 1984*, 2nd edn., London: Sweet & Maxwell.

Zellick, G. (1984) "The Purpose Behind an Arrest", *Criminal Law Review*, 94.

Zuckerman, A.A.S. (1973) "Criminal Law Revision Committee 11th Report, Right of Silence", 36 *Modern Law Review*, 509.

Zuckerman, A.A.S. (1989) *The Principles of Criminal Evidence*, Oxford: Clarendon.